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THE

AMERICAN LAW JOURNAL,

VOL. V.

BEING THE SECOND OF A NEW SERIES.

BY JOHN E. HALL, ESQ.

COUNSELLOR AT LAW, IN THE SUPREME COURT OF THE UNITED STATES.

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Seu linguam causis acuis; seu civica jura
Respondere paras.....

BALTIMORE:

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THE

AMERICAN LAW JOURNAL.

TO READERS AND CORRESPONDENTS.

HAVING in the preceding volumes of this journal, laid before our readers, the most interesting among the various publications which have appeared on the celebrated controversy respecting the Batture at New Orleans, we now complete the collection by presenting them with the pamphlet published in 1812 by Mr. Jefferson in justification of his conduct in that case, and Mr. Livingston's answer to it, now printed for the first time from the author's manuscript,* communicated by himself for the Law Journal. We are also enabled by Mr. Jefferson's politeness to offer an improved edition of his valuable tract, by means of the corrections and additional notes† which he has transmitted to us with his permission to republish it in this repository of juridical learning.

We hope our readers will be pleased with the republication in its present improved state, of this Exposition of the motives which determined the conduct of the late president in this case. Indeed, we could not, in justice, omit laying it before the public at the same time with the answer of his adversary. Justice requires that both parties should be fairly and fully heard, that the candid inquirer may have it in his power at any time to confront them with each other, and thus judge of the correctness of their assertions and the fairness of their arguments.

* A small number of copies has been struck off separately, to gratify those who are not subscribers to this Journal, and for distribution among Mr. Livingston's friends.

† The additional notes are marked *MS. Note.*

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Of Mr. Livingston's answer, we must acknowledge, that to us it appears to be one of the most able and masterly performances that ever came from the pen of a lawyer or scholar in any country. When all the angry passions which this controversy has excited shall have subsided, we may venture to predict that this "answer" will be cited as a model of juridical eloquence and argument. It is long, but the reasoning is so luminous, so close, so methodical; the style is so elegant, the corruscations of wit so splendid, and the vein of irony so delicate, yet severe, that the attention of the reader is irresistibly fastened to the page. As both tracts are now presented together, illustrated by suitable charts, with full indexes, references, and all the editorial helps that we have had it in our power to bestow, our subscribers will have an opportunity of comparing the arguments of these two great champions, who, on this occasion, appear to have staked no inconsiderable degree of legal, political and even moral reputation. For ourselves, we are, if possible, strengthened in the opinion which we have long since formed and published in favour of Mr. Livingston's claim. His answer is emphatically, a *réplique sans réponse*. It puts an end to the Batture controversy, and we are fully convinced that the decision of an enlightened public will confirm the decree of the federal court at New Orleans, by which Mr. Livingston's ejection from the Batture has been declared illegal, and he restored to the possession, and, we hope, to the *quiet* enjoyment of his long contested property.

We have paid particular attention to the correctness of the printing of these valuable tracts, and on revision have found but very few errata, which we have duly noticed and pointed out to the reader.* We have thought it our duty to preserve Mr. Jefferson's peculiar orthography, having observed that he uniformly writes the word *knowledge* and its compounds, without the *w*. Although we do not approve of the innovation, we have not thought ourselves authorised to vary from the spelling adopted by this eminent author. We have at the same time corrected every error in the first edition which appeared to us to be owing to the fault of the copyist or the printer.

As most, if not all the publications respecting the Batture, which we have inserted in our former volumes, are referred to

* For the Errata, see page 91 and 112.

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in many places in these two pamphlets, we subjoin a table of reference, that the reader may more easily turn to them if he think proper. We regret that we have not, whenever these references occurred, pointed to the volume and page of this journal where the several quotations were to be found. We thought of it when it was too late. We have, however, double paged Mr. Jefferson's pamphlet, the references to it in Mr. Livingston's publication, being always to the pages of the original edition.

1. Case stated by the Corporation of New Orleans, with Mr. Derbigny's opinion thereon. 2 Am. Law Journ. 282.
2. Examination of the title of the United States to the Batture. By Edward Livingston, Esq. ibid. 307.
3. Mr. Duponceau's opinion on the case of the Batture in opposition to Mr. Derbigny's. ibid. 392.
4. Case stated by Mr. Livingston with the opinions of Messrs. Ingersoll, Rawle, Tilghman and Lewis thereon. ibid. 434.
5. Review of the case of the New Orleans Batture, &c. by Peter S. Duponceau, Esq. 4 Am. Law Journ. 517.

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THE

PROCEEDINGS

OF THE

GOVERNMENT OF THE UNITED STATES,

IN MAINTAINING

The Public Right

TO THE

BEACH OF THE MISSISIPI, ADJACENT TO NEW-ORLEANS,

AGAINST THE

INTRUSION OF EDWARD LIVINGSTON;

PREPARED FOR THE USE OF COUNSEL,

BY

THOMAS JEFFERSON.

Printed at New York in 1812, and now republished, with corrections and additional Notes, by the Author.

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* The figures in this table refer to the pages of the original edition of Mr. Jefferson's pamphlet, which in this edition are marked with an asterisk, and placed in the margin.

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PREFACE.

EDWARD LIVINGSTON, of the territory of Orleans, having taken possession of the beach of the river Missisipi adjacent to the city of New-Orleans, in defiance of the general right of the nation to the property and use of the beaches and beds of their rivers, it became my duty, as charged with the preservation of the public property, to remove the intrusion, and to maintain the citizens of the United States in their right to a common use of that beach. Instead of viewing this as a public act, and having recourse to those proceedings which are regularly provided for conflicting claims between the public and an individual, he chose to consider it as a private trespass committed on his freehold, by myself personally, and instituted against me, after my retirement from office, an action of trespass, in the circuit court of the United States for the district of Virginia.

Being requested by my Counsel to furnish them with a statement of the facts of the case, as well as of my own ideas of the questions of right, I proceeded to make such a statement, fully as to facts, but briefly and generally as to the questions of right. In the progress of the work, however, I found myself drawn insensibly into details, and finally concluded to meet the questions generally which the case would present, and to expose the weakness of the plaintiff's pretensions, in addition to the strength of the public right. These questions were of course to arise under the laws of the territory of Orleans, composed of the Roman, the French, and the Spanish codes, and written in those languages. The books containing them are so rare in this country as scarcely to be found in the best furnished libraries. Having more time than my Counsel, consistently with their duties to others, could bestow on researches so much out of the ordinary line, I thought myself bound to facilitate their labours, and to furnish them with such materials as I could collect. I did it by full extracts from the several authorities, and in the languages in which

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they were originally written, that they might judge for themselves whether I had misinterpreted them. These materials and topics, expressed in the technical style of the law, familiar to them, they were of course to use or not to use, according to the dictates of their own better judgment. If used, it would be with the benefit of being delivered in a form better suited to the public ear. I passed over the question of jurisdiction, because that was one of ordinary occurrence, and it's limitations well ascertained. On this, in event, the case was dismissed; the court being of opinion they could not decide a question of title to lands not within their district. My wish had rather been for a full investigation of the merits at the bar, that the public might learn, in that way, that their servants had done nothing but what the laws had authorized and required them to do. Precluded now from this mode of justification, I adopt that of publishing what was meant originally for the private eye of counsel. The apology for it's general complexion, more formal than popular, must be found as well in the character of the question, as in the views with which it's discussion had been prepared. The necessity, indeed, of continuing the elaborate quotations is strengthened in the case of ordinary readers, who are supposed to have still less opportunity of turning to the authorities from which these are taken.

The questions arising, being many and independent of each other, admitted not a methodical and luminous arrangement. Proceeding, therefore, in a course of narrative, I have met and discussed the points of law in the order in which events presented them; thus securing, as we go along, the ground we pass over, and leaving nothing adversary or doubtful behind. Hence the mixture of fact and law which will be observed through the whole.

Vouchers for the facts are regularly referred to. These are principally, 1. Affidavits taken and published on the part of the plaintiff, and of the city of New-Orleans, very deeply interested in this question. 2. Printed statements, by the counsel on each side, uncontradicted by the other, of facts under their joint observation and knowledge. 3. Records. 4. Notarial acts, and 5. Letters and reports of public functionaries filed in the office of the department of state.

Feb. 25, 1812.

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THE

PROCEEDINGS

OF THE

Government of the United States, &c.

NOT long after the establishment of the city of New-Orleans, and while the religious society of Jesuits retained their standing in France, they obtained from Louis XIV a grant of lands adjacent to the city, bearing date the 11th of April, 1726. The original of this grant having been destroyed in the fire which consumed a great part of the city in 1794, and no copy of it as yet produced, the extent and character of the grant is known from no authentic document. It's other limits are unimportant, but that next the river and above the city is understood to have been of 20 arpents, or acres, [of 180 French feet, or 64 yards of our measure each,] 'face au fleuve,' the ambiguity of which expression is preserved by translating it, 'fronting the river.' Whether this authorized them to go to the water line of the river, or only to the road and levee, is a question of some difficulty, and not of importance enough to arrest our present attention. To these they had added 12 arpents more by purchase from individuals. In 1768 the order of Jesuits was suppressed in France, and their property confiscated. The 32 arpents, before mentioned, were divided into 6 parcels, described each as 'faisant face au fleuve,' and the one next to the city of 7 arpents in breadth, and 50 in depth, was sold to Pradel; but how these 7 arpents, like Falstaff's men in buckram, became 12 in the sale of the widow Pradel to Renard, [Report 7.] 13 in Gravier's inventory, and nearly 17, as is said Derb. viii. ix. in the

Title of the Jesuits.

Fronting river.

Confiscation.

Gravier's title.

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extent of his fauxbourg, the plaintiff is called on to show, and to deduce titles from the crown, regularly down to himself. In 1788, Gravier, in right of his wife the widow of Renard, laid off the whole extent of his front on the river, whatever it was, into 4 ranges of lots, and in '96 he added 3 ranges more, establishing them as a Fauxbourg, or Suburb to the city. That this could not be done without permission from the government may be true; and no formal and written permission has been produced. Whether such an one was given and lost in the fire, or was only verbal, is not known. *But that permission was given must be believed, 1. From Gravier's declaration to Charles Trudeau the surveyor, which must operate as an Estoppel [Report 45.] against all contrary pretensions in those claiming under him. 2. From Carondelet's order to Trudeau, first to deposit a copy of the plan in the public archives, and afterwards an order for a second one to be delivered to himself, which implied necessarily that he had consented to the establishment; but more especially when B. Gravier relying on this establishment as freeing him from the repairs of the bank, the Governor declared 'it was true and that Gravier was right.' 3. From the records of the Cabildo, or town council, with whom the Governor sat in person, showing that at their sessions on the 1st day of January annually, for regulating the police of the city, a Commissary of police for the new quarter was regularly appointed from the year 1796, till the United States took possession. The actual settlement of the ranges next the river, and the addition of the new ranges, now probably rendered that necessary. 4. From the conviction expressed by the Surveyor that, from his knowledge of the laws and customs of the Spanish colonies, no one would have dared to establish a city, bourg, village or fauxbourg without authorization, verbal at least, from the Governor. 5. From the act of the local legislature incorporating the city of New-Orleans. [Thierry 32.] That no formal written act of authorization can be produced is not singular, as that is known to be the condition of a great proportion of their titles from the government: and the extraordinary negligence in these titles was what rendered it necessary for Congress to establish, in the several territories of Orleans, Missisipi, Louisiana, Indiana and Michigan, boards of Commissioners, to ascertain and commit

Fauxbourg.

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them to record. To this we may add that the principle which shall take from the inhabitants of the Suburb St. Mary the validity of their establishment, will annul a great portion of the land rights of those several territories. Finally, whatever act of the government may be considered as amounting to evidence of it's ratification of the establishment of the fauxbourg, is retrospective, and will amount to an original authorization under the maxim, 'omnis ratihabitio retrotrahitur, et mandato æquiparatur.'

Gravier's sale.

Bertrand Gravier proceeded to sell the lots of his new Fauxbourg, and particularly he sold the whole range next the river. Such deeds for these lots as have been produced describe them as 'haciendo frente al rio,' 'fronting the river.' And it is affirmed, [Examen 13. Poydras 7. and 18. Thierry 39.] that almost all, if not all the deeds used the same expression. [See notarial copies of the deeds of B. Gravier to Nicholas Gravier, and of Nicholas Gravier to Escot, Girod, *Wiltz.] Bertrand Gravier himself, on all occasions, [Pieces Probantes 9. 21. 28. 30. Livingston 59. Monile's deposition, MS.] declared that he had sold his lots 'faisant face au fleuve,' and had passed to the purchasers his right to the *devanture*, meaning every thing in front of his lots. Whatever extent then, towards the river, passed to the Jesuits by the term 'face au fleuve,' or from the king to the purchasers of the Jesuits' property, under whom B. Gravier claimed, the same extent was, by the same expression, 'face au fleuve,' or 'frente al rio,' passed by Bertrand Gravier to the purchasers of the front lots. If the words, 'face au fleuve,' gave him only to the road and levee, he by the same words gave them no farther: if to the water edge, then he sold to the water edge also, and having parted with all his right as riparian possessor, could transmit none to those claiming under him by subsequent title, as the plaintiff does. In a note added to the end of the printed Report of this case, whether by the reporter, or the plaintiff does not appear, it is said that this objection was answered by showing, *from the deeds*, that each lot had a clear front boundary, by referring to the '*plan which in no instance crossed the road.*' And that this brings it within the rule of law which says, 'in agris limitatis jus alluvionis locum non habere constat.' Dig. 41. 1. 16. This process of deduction, if not clear, is com-

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pendious at least, and better placed in a note, than in the text, where explanation would have been expected. Let us spread it open and examine it. What says the deed to Nicholas Gravier for 58 lots?

Yo Don Beltran Gravier vendo a Don Nicholas Gravier cinquenta y ocho terrenos situados en esta dicha ciudad, extramuros de la puerta de Chapitulas, à saver, *trece haciendo frente al rio* Missisipi, y lindando por el lado de abaxo, que es de esta dicha ciudad, con terreno de Don R. Jons, y por el de arriba con otros de Don J. B. Sarpy, &c. Y los *quarenta y cinco terrenos restantes* completa à los cinquenta y ocho, que quedan indicados, comenzan sobre el limite de la primera calle, formando una linea directa, à empezar por el terreno que se halla detras del de Don J. Poydras, todo conforme al plano que, delineado por Don C. L. Trudeau, hé entregado al comprador para su *8 inteligencia* y resguardo: però con la condicion de que me reservo el derecho di tomar la tierra que necessitaré para mi fabrica de ladrillos, en la playa ò Battura que hay en la extension de los nominados trece terrenos que hacen frente al dicho rio.

I Don Bertrand Gravier sell to Don Nicholas Gravier 58 lots situated in this said city without the gate of Chapitulas, to wit, 13 *fronting the river* Missisipi, and bordering on the lower side, which is that of this said city, with the lot of Don R. Jones, and on the upper side with others of Don J. B. Sarpy, &c. And *the* 45 *lots remaining*, the complement of the 58 before mentioned, commence above [or beyond] the limit of the first street forming a right line, beginning at the lot which is behind that of Don J. Poydras, in conformity with the plan which having been delineated by Don C. L. Trudeau, I have delivered to the purchaser for his information and ascertainment: Nevertheless, with the condition that I reserve to myself the right to take the earth which I shall need for my manufacture of bricks on the beach or batture which is in the extension of the said 13 lots which front the river.

The first part of this description is of the 13 lots, to wit, that they front the river. The second part relates wholly to the remaining 45 lots, which begin beyond or above the first street in a straight line from the lot behind Poydras's, and refers to the plan to show their position more particularly as back lots, behind the front range. It is to be noted that the public way in

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front of the fauxbourg is not a street: it is the same chemin royale, royal road, which has existed from early times, and has never been merged in the character of a street. Nothing can prove more clearly that this reference to the plan was not to give a front line to the 13 lots, than that the same deed reserves the right of digging earth on the batture beyond that line. Now if nothing was meant to be conveyed *beyond* the front line marked in the plan, why reserve a right to dig earth on the batture, which is *beyond* that line? And that Nicholas Gravier, Escot, Girod and Wiltz did not consider this line as the limit of their rights, appears from their deeds conveying the *batture* expressly by that name, with the lots themselves. On the whole we see here a curious specimen of tergiversation in reasoning. When urged that the grant to the Jesuits, and to Bertrand Gravier, though expressed to be 'face au fleuve,' must still have stopped at this line or edge of the royal road, it is answered that those terms convey to the water edge and make it an 'ager arcifinius,' to which the right of alluvion appertains. But when Bertrand Gravier conveys to his purchasers 'face au fleuve,' they turn about and say that the same identical words, 'face au fleuve,' convey now only to this same line or edge of the royal road, which they overleaped before, and make the grounds conveyed an 'ager limitatus,' to which the right of alluvion does not appertain. It is perfectly equal which of the meanings is ascribed to these words. Only give them the same in both instances, and say which. If these words make the road your boundary, you never had a right to the batture beyond it. If they extend to the river what was conveyed to *you*, they extend to the river also what was conveyed *from you*. Will it be pretended that, after establishing his town, Bertrand Gravier could then have sold the streets to others? and yet he might, a fortiori, having not included them in any deed. But does not common sense and common honesty *proclaim that the establishment of his town, and sale of the lots, implied a relinquishment to the inhabitants of the communications of streets and shores adjacent, as a common, which are the necessary and constant appendages of every town? The express conveyance then of his riprarian rights, and the implication as to them and the streets, are believed to be conclusive to show that the plaintiff having had no right, can have sustained no wrong.

Streets.

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In 1797, Bertrand Gravier died intestate; and at this epoch we must introduce what constitutes the sole object of the existing contest. Opposite to the habitation or plantation of B. Gravier, now the Fauxbourg Ste. Marie, the beach of the river, called in that country Batture, of ordinary breadth within memory, has sensibly increased, by deposits of earth, during the annual floods, of the river, [Derb. xix.] till in the year 1806, it was found to extend in breadth, at low tide, from 122 to 247 yards of our measure, from the water edge into the river: and from about 7 f. height, where it abuts against the bank, declining to the water edge. See Pelletier's plan annexed. Thierry xvii. While uncovered, which is from August to January inclusive, it has served as a Quai for lading and unlading goods, stowing away lumber and firewood, and has furnished all the earth for building the city, and raising its streets and courts, essential in that oozy soil. Derb. ii. While covered, which is during the other 6 months of the year, from February to July inclusive, [Liv. 58. Poydras 20. 21. 23.] it is the port for all the small craft of the river, and especially for the boats of the upper country, which, in the season of high water, can land or lie no where else in the neighbourhood of the city. During this period they anchor on its bottom, or moor to its bank. It is then, like every other beach, the bed of the river one half the year, and a Quai the other half, distinguished from those of tide waters, by being subject to an annual, instead of a semidiurnal ebb and flood. In this beach or shoal, with the bank to which it is adjacent, if Bertrand Gravier claimed any right, as riparian proprietor of the habitation, he had certainly meant to convey that right to the purchasers of the front lots, by the term 'frente al rio,' 'fronting the river,' reserving expressly, as we have seen, from one purchaser of 58 lots, a right to take earth, from the beach, for his brickkilns. As he died without children, the inheritance belonged to John Gravier, and other brothers and sisters whom he had left in France, or their representatives, as co-heirs.

Beach or Batture.

By the civil law, if an heir accepts the inheritance, he is considered, not merely as the representative, but as continuing the person of the ancestor himself, is answerable for all his debts, and out of all his property, as well his own, as what he had newly acquired by the inheritance.

Purchase by Inventory.

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Time, therefore, was allowed him to inform himself of the condition of the estate and debts, during which it was considered as an hæreditas jacens, vested in nobody. If he declined taking the inheritance simply as heir, he was allowed to take it as purchaser, or in their language, as heir with the benefit of inventory: whereupon an inventory and appraisement of it took place, and he had the preemption at the appraised value. He was then liable to no more debts than the amount of the appraisement; and if there were a surplus of the appraised value over and above the debts it was his, if a single heir, or partitioned among the co-heirs, as parceners, if there were more than one. Brown. civ. law, I. 218. 302. Kaim's law tracts, 389. Gibbon's c. 44. 153. Bertrand Gravier is understood to have left France indebted and insolvent: and John Gravier, therefore, either knowing, or ignorant of the amount of the debts, chose, on behalf, or perhaps in defraud, of the co-heirs, to decline the inheritance, and to take the estate as a purchaser by inventory and appraisement. It was inventoried and appraised. In the inventory is placed a single article of lands, in these words, 'are placed in the inventory the lands of this habitation, whose extent cannot be calculated immediately, on account of his having sold many lots; but Mr. N. Gravier informs us that it's bounds go to the forks of the bayou, according to the titles.' And in the appraisement also there is but this same single article of lands, thus described, 'about thirteen arpents of land, of which the habitation is estimated, including the garden, of which the most useful part is taken off in the front, the residue consisting of the lowest part, [to wit, that descending back to the bayou,] the side being sold to Navarro, one Percy, and the negro Zamba, a portion of which, &c. estimated at 190 D. the front acre, with all the depth, which makes 2470 D.' Then follows the adjudication, which adjudges to John Gravier 'the effects, real estate, moveables and slaves *which have been inventoried* as belonging to the estate of his deceased brother Bertrand Gravier, &c. Report. 9. 10. We see, then, that no lands were inventoried but the thirteen arpents in front, composing the inhabitation. And it is impossible that that term should be meant to include the beach of the river, cut off from it by the intervention of the whole Fauxbourg of seven ranges of squares; or that they should not have used a more obvious expression, if

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the idea of the beach had been in their minds. Nobody could consider these two parcels, distant and disjoined as they were, as being one parcel only, one habitation. No man having two farms, or two tracts of land, separated by the lands of others, would expect that by devising or conveying one, the *11 other would *pass also. In fact, at that time, neither John Gravier nor any one else, considered the beach as any part of Bertrand Gravier's estate: and in the appraisement, they estimate the front arpents, (that is, fronting on the fauxbourg,) with all their depth to the bayou, at 190 dollars, the front arpent; contemplating clearly only what was between the fauxbourg and bayou. Accordingly Fernandez, acting for the Depositor General, the legal officer in those cases, swears that he took charge and possession of all the estate according to the inventory which had been made from the 28th of June to the 4th of July, 1797; that, in that inventory, the batture never was mentioned, or heard of, as property of Gravier, nor in charge of the Depositor, and that, on delivering the estate to John Gravier the batture never was spoken of. It is equally certain that had there been an idea that they were smuggling the batture away, through these proceedings, the Citizens of New-Orleans would not have been so silent, nor the Governor, the Cabildo and other Spanish authorities so passive, when so active on all former occasions respecting the batture: and that had the batture been under the view of the appraisers, instead of estimating it at 2470 dollars, conjointly with other thirteen arpents, a very different sum must have been named. The batture alone is now estimated at half a million of dollars. But the truth is, that neither John Gravier, nor any one else, at that day, considered it but as public property. And for six years ensuing, he never manifested one symptom of ownership; until Mr. Livingston's arrival there from New-York, with the wharves and slips of that place fresh in his recollection. The flesh-pots of Egypt could not suddenly be forgotten, even in this new land of Canaan. Then John Gravier received his inspiration that the beach was his; and is tempted, by one kind of bargain after another, to try his fortune with it. It was only to lend his name, and receive a round sum if any thing could be made of it. To get over the palpable omission of it in the inventory and appraisement, they

Livingston's arrival

Parisien.

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find a man whose recollection is exactly à propos; a Henry Parisien, a comedian by profession, and joiner by trade. He had been one of the appraisers, 10 years before, and recollected, and so swore that he had '*walked on the batture*, before the closing of the appraisement to ascertain it's extent, and be the better able to judge of its value, and that it was through forgetfulness that *it had not been taken into the estimate.*' Pièces Prob. 33. It happens that nature bears witness against him. From the 28th of June to the 4th of July is within the period of high waters; and it is proved that, at the very time of the appraisement, the river was still overflowing, and the batture covered with water: *the journals of the sawmills further attest 12* that they did not cease to work till the 25th of August of that year; and when the waters of the river are sufficiently low to stop the mills, all the battures are still covered with water. P. Pr. 34. However even this Henry Parisien swears, '*that the batture was not in the estimate*, and that it was through forgetfulness that it was not.' Examen 19. Rep. 21. Pi. Prob. 33. No matter through what cause, it is enough that it was *not in the inventory or estimate*, and of course not sold to J. Gravier. This corroborates the testimony of the Depositor, that he neither had it in his charge, nor included it in the estate sold and delivered. J. Gravier must therefore, as to this part of his brother's estate, if his it were, recommence his work, by having a new inventory, appraisement and adjudication. But to repel the present proceeding, it suffices that having made his election to take, not as heir, but purchaser, this beach is not yet his; it is still an hæreditas jacens, and before he can convey it to Mr. Livingston, he must get it by a new process, and make a third bargain.

We will proceed further to trace the history of this acquisition of the batture, by the plaintiff, who writes a letter of lamentations to some member of the government, on the 27th of June 1809. That 'Congress will probably adjourn without coming to any decision on the subject of my removal by the late president of the United States from my estate at New-Orleans.' A most ungrateful complaint; for had he not been removed, he must, at the time of writing this letter, have been, as his estate was, some 10 or 12 feet under water; the river being then at it's greatest height. And when was this notable discovery made, that the

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beach of the river was the separate and exclusive property of J. Gravier, clear of all public right to it's use? Let us hear the Governor, in answer to this question. In a letter to the Secretary of State of October 13, 1807, he says, 'early after the arrival of Mr. Livingston in this territory, he became concerned in the purchase of a parcel of ground fronting the fauxbourg of this city, commonly called the batture, a property which had been occupied as a common by the city for many years previous, and the title to which, in the opinion of the inhabitants was unquestionable.' The day* of the arrival of Mr. Livingston in New-Orleans, I do not know; but I recollect he was one of the earliest emigrants to that country, which was ceded to the United States on the 30th of October, 1803. We are told, [Rep. 11. Thierry 5.] it was proved by some oral testimony that J. Gravier *began* an inclosure of 500 feet square in that *13 year, and completed it the next. The day *of beginning is not stated; but we may safely presume it was not while the French Governor thought the country belonged to his master, and most probably not till after 'the early arrival of Mr. Livingston.' This inclosure was demolished by an order of the Cabildo of Feb. 22, 1804.† The next step was to make an ostensible deed, to an ostensible purchaser,‡ a Peter de la Bigarre, a brother emigrant of Mr. Livingston's from New-York; some old acquaintance. This was dated March 27, 1804, is expressed to be in consideration of 10,000 dollars, and conveys two undivided thirds of all that part or parcel of land, situate on the bank [sur la rive] of the river Missisipi, between the public road and the current of the said river, &c. with a warranty. I call the purchaser ostensible, because notwithstanding his pretended purchase, J. Gravier, on the 20th of October, 1805, [Rep. 1.] commenced a suit against the city, as proprietor of the whole, and the court adjudged him proprietor of the whole; and because the same J. Gravier, [Poydr. 3.] by a deed to the same P. de la Bigarre, in which no mention was made of the former, nor reference to it, conveys to him on the 14th Dec. 1806, the batture Ste. Marie, along the whole limits of this land, between the road and river, on con-

Bigarre.

* He says, February, 1804. See Address.

† Thierry. ‡ Notar. copy, Gravier to Bigarre.

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dition that he shall pay all expenses of the suit depending, with 50,000 dollars in addition; that the property shall remain unsold and hypothecated for the purchase money till paid, and that if the law-suit fails, the sale is void, and Bigarre to pretend to no damages for non-execution. It is observable here that neither buyer nor seller risked any thing. It was a mere speculation on the chance of a law-suit, in which they were to divide the spoils if successful, and to lose nothing if they failed.* It was by our law a criminal purchase of a pretensed title, 32. H. 8. 9. and equally criminal by the law of that territory, where I presume the provision of the Roman law is in force, 'qui improbè coeunt in alienam litem, ut quidquid ex condemnatione in rem ipsius redactum fuerit, inter eos communicaretur, lege Juliâ, de vi privatâ tenentur.' Dig. 47. 8. 6. 4 Blackst. 135. 'Whosoever shall take part in the suit of another, so that whatever shall be recovered by the judgment is to be divided between them, shall be subject to the Julian law de vi privata.' By which law, ib. tit. 7. § 1. they were to lose one third of their goods, and be rendered infamous. The deed was not only criminal on it's face, but was void by an express law of the territory, [a law of Governor Unzaga. Poydras 6. Rep. 25.] and so pronounced to be on the floor of Congress *by their repre- 14*
sentative, because not executed before either witnesses or notaries. It was kept secret from its date, till the day before judgment was pronounced, when the parties becoming apprised of the decision which was to be given, (for this was known at least on the 20th of May,) [Governor Claiborne's letter May 20, '07,] produced it, for the first time, to the Notary to be recorded. And the day after it's publication, the court, by the opinion of two members against one, [Examen 3.] adjudged the property wholly to the very man, who, if he had ever had any right, had conveyed away two thirds of it, before he brought his action, and the whole while it was pending. The alarm which this adjudication produced was immediate and great. The fact was notorious that, from the earliest to the latest extension of the beach, the public had had a free use of

Decision of Court.

Alarm occasioned.

* Lafon, in his map of New-Orleans, says expressly that the Missisipi, at the city, is uniformly of the breadth of 300 toises only.—*MS. Note.*

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it, as their Quai in low water, and in high water their port; and never before had their right been doubted by themselves, or questioned by the riparian possessors. If any fact was ever proved by human testimony, this is. Turn to the Pièces Probantes and out of 29 affidavits of the oldest and most respectable persons in the territory, men who had, most of them, borne offices under their former government, 21 of them uniformly declare that the public had ever been considered as having a right to the beach, as their port and Quai, that, as such, the Governors and Cabildo had the constant care and controul of it, had demolished buildings and inclosures erected on it, had, by public Ban, prohibited all erections or obstructions to it's use, had themselves erected a rampart, to inclose within it a chamber accessible for earth at high water for rebuilding the city after the fire, and had exercised uninterruptedly every other act of authority derived from the public rights; and 11 of them prove, as far as a negative can be proved, that the Graviers, till the change of government, and new views by Edward Livingston, had never pretended to more than the right of Common in it, and never had questioned that of the public, or the authority of the Governor and Cabildo over it. While they held the adjacent plantation indeed, they maintained the road and bank, as all rural proprietors are obliged by* law to do: for here it is proper to observe, that pursuing the spirit of the Roman law, which prescribed that every one should maintain the public road along his own dwelling, 'construat vias publicas unusquisque secundum propriam domum.' Dig. 43. 10. 3. The lands in Louisiana were granted generally on a condition, (called in those laws a *servitude,) of furnishing ground for a public road, and of opening and maintaining that road. From which condition, however, they were released as to any portion of the ground which should afterwards become a town; the expense of roads or streets of that portion devolving then on the town itself. Accordingly B. Gravier, after establishing the front of his plantation into a suburb, and thus cutting off the residue from the road and river, being† called on to repair the road by an order from Governor Carondelet, who seems at the moment not to

Servitude of road.

*15

* Rep. 19.

† Mosile's affidavit, MS.

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have adverted to the change, Bertrand Gravier answered, that having sold the lots, *faisant face au fleuve*, fronting the river, he had abandoned the batture to the town, and that the road and levee could not be at his expense, the Governor, correcting himself at once, says, 'Gravier is right, all this is true,' and immediately, and ever after had the repairs made by the public. And the Graviers from that time stood discharged from these burthens on the same principle which had freed the original owners of the site of the city from maintaining the banks of the city. This is declared by an host of witnesses in the Pieces Probantes, and probably could have been declared by every antient inhabitant of the place. We are told indeed by Laroche and Segur, in their affidavit, [Livingston 66.] of Carondelet, and some other Governor asking leave of Gravier in 1795 and 1798, to deposit masts on the beach. If this be true, which Mr. Thierry, [p. 42.] who knew the witnesses, treats as ridiculous and absurd, it shows that they were forgetful, or inconsistent, or over complaisant; but not that Gravier required, or expected to be asked; and much less could it divest a public right, acknowledged from the earliest times, and essential to the commerce and existence of the city. An accurate discrimination indeed between the measure of right in the riparian proprietor while he held the adjacent farm, in the individuals of the nation as usufructuaries, and in the sovereign as their representative and trustee, as respectively apportioned to them by the law, seems not to have been attended to either by the citizens at large, or the adjacent proprietors. The riparian possessor appears to have been sensible he had some rights, without distinctly understanding what they were: but, whatever they were, he knew he had parted with them by the deeds establishing his fauxbourg. The citizens, in the daily habit of using without control the port and Quai, imagined themselves exclusive proprietors of it's soil, and came forward in that capacity, claiming, sometimes under some vague title which they did not define, and sometimes under the abandonment of right by Bertrand Gravier; *the Sovereign, formerly their kings, but now the United States the legal holder of the public rights in the beds, beaches and banks of all navigable waters, seem not to have been thought of at all in the contest. The United States were no party to the suit;

16*

U. States no party.

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nor could they be, having made themselves *amenable* to no tribunal. Their property can never be questioned in any court, but in special cases in which, by some particular law, they delegate a special power, as to the boards of Commissioners, and in some small fiscal cases. But a general jurisdiction over the national demesnes, being more than half the territory of the United States, has never been by them, and never ought to be, subjected to any tribunal. Not adverting to this circumstance, however, the consternation in New-Orleans, on this decision, was like that of Boston, on the occlusion of their port by the Boston port bill. If we have not forgotton that feeling, we may judge what the citizens of New-Orleans felt on this decree of the court.

The governor instantly writes, [letter of May 20, '07.] 'I understand that this morning an important cause has been determined, in which Edward Livingston was the *real* plaintiff, and the city defendant, as to the right of property to some lands in front of the fauxbourg, made by the river, and over which the city has heretofore exercised a right of ownership. My impression is that the United States are the legal claimants to it.' On the 21st of August, 1807, Mr. Derbigny's opinion was published, [Thierry 5.] and first brought into view the right of the United States, and that the sentence of the court must of course, as to them, be a mere nullity, 'res inter alios acta, quæque aliis non potest præjudicium facere.' A thing passing between others, and which to no others can do prejudice. Codex. 7. 60. And coming, with respect to the United States, under the provisions of the same code.

Tit. 56. 'Si neque mandasti fratri tuo defensionem rei tuæ, neque quod gestum est ratum habuisti, præscriptio rei judicatæ tibi non oberit: et ideò non prohiberis causam tuam agere, sine præjudicio rerum judicatarum.'

'If you have not committed to your brother the defence of your right, nor sanctioned what has been done, the plea *rei judicatæ* shall not bar you: and therefore you shall not be precluded from conducting your own cause, without exception from a former decision.'

Certainly the city council did not appear, nor pretend to appear, under authorization from the government of the United

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States, nor as the advocates of their rights. They were called there as defendants of their own claim. The court did not undertake to decide on the right of the United States, which was *neither before them, nor within their competence; and the injunction they issued could only be addressed to the parties between whom they had adjudged, and not to suspend the rights of others whom they had never heard, much less of the United States who could not be heard before them. See 2 Dallas 408. 3 Dallas 412. 414. 415. *17

Livingston's Intrusion.

Presuming, however, that the coast was now clear, and the question finally settled, the ostensible actors withdrew, and their principal comes forward, is put into possession by the Sheriff, and begins his works. The Governor, in his letter of Sept. 3, 1807, says, 'a few days since, [Aug. 24.] Mr. Livingston employed a number of negroes to commence digging a canal which he projected to make in a part of the land called the batture. But the citizens assembled in considerable force and drove them off. On the day following he went in person, but was again opposed by the citizens. The minds of the people were much agitated. The opposition is so general that I must resort to measures the most conciliatory, as the only means of avoiding still greater tumult, and *perhaps much bloodshed.* I have not issued a proclamation because it might make an impression in the United States that the people are disposed for insurrection, which is not true. My opinion is that the title is in the United States. If the batture be reclaimed, it is feared the current of the Missisipi will in some measure change it's course, which will not only prove injurious to the navigation, but may occasion degradation in the levees of the city, or those in it's vicinity.' To abridge our narration by giving the substance of the communications. The people assembled the next day about the same hour, and for several days successively, by beat of drum. [Livingston's letter of Sept. 15, '07.] On Monday the 31st of August, Mr. Livingston recommenced his work, after having given notice that he should do so. He began about 10 o'clock, A. M. and about 4 or 5 o'clock in the afternoon the people assembled again and drove off his labourers. On the 14th of September he again attempted to work, getting two constables to attend his labourers. The people drove them off, and the constables having noted on a list some

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of those present, they seized them, took the list and tore it to pieces. [Sheriff's letter.] On the next day he writes to the Governor that he shall set his labourers to work again that day at 12 o'clock, and 'he shall not be surprised to see the people change the insolence of riot into the crime of murder.' At noon he accordingly placed 10 or 12 white labourers there. In the afternoon the people re-assembled to the number of several hundreds. The Governor repaired there and spoke to them. He was heard with respectful attention:* and one of them, speaking for the whole, expressed the serious uneasiness which the decision of the court had excited, the long and undisturbed possession of the batture by the city, as well under the French as the Spanish government, and the great injury which would result to the inhabitants if the land should be built upon and improved. And another declaring that they wished the decision of Congress, and in the mean time, no work to be done on the batture, there was a general exclamation from the crowd, 'that is the general wish,' followed by a request that they might nominate an agent to bear to the President of the United States, a statement of their grievances, and that the Governor would recommend the agent to the government. He said he would do so, and they nominated Col. Macarty, by general and repeated acclamations. They then withdrew in peace to their respective homes, and on the 16th the Governor expresses his hope that this unpleasant affair is at an end, that every thing is then quiet, and the public mind much composed: that some of his hot-headed countrymen censured the mild course which was pursued, and would have been better pleased if the *military* had been called upon to disperse the assemblage. But I feel, says he, that the policy adopted was wise and humane, and that a contrary conduct would have increased the discontents, and *occasioned the effusion of much innocent blood.* The Louisianians, he adds, are an amiable virtuous people, but sensibly feel any wrongs which may be offered them. Mr. Livingston is alike feared and hated by most of the antient inhabitants. They dread his talents as a lawyer, and hate his views of speculation, which in the case of the batture are esteemed very generally by the Louisianians no less iniquitous, than ruinous to the welfare of the city.' The Governor says in another letter of October

*18

Appeal to government of the United States.

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5, to the Secretary of state, that in a progress he made a few days afterwards through several parishes of the territory, he perceived but one sentiment with respect to the decision of the court. The long and uninterrupted use of the batture by the city, the sanction given by the Spanish authorities to the public claim, and the heavy public expenditures in maintaining the levee which fronts it, seem to have given rise to a very general opinion that the court has been in error in deciding the batture to be private property. On the 13th of November he again writes, 'I should be wanting in duty did I not earnestly recommend the subject of the batture to the attention of the government. There is no doubt but the agents of Spain considered it as a public property, and did appropriate the same to the use of the city, as a common. I should presume that, under the treaty, the United States may justly claim the batture, and if any *means can be devised to arrest the *19
judgment of the territorial court, or to carry this case before another tribunal, the earlier they are resorted to, the better; for Mr. Edward Livingston is now in possession of the property, and *making improvements thereon.*' And the next day, Nov. 14, a grand jury of the most respectable characters of the place gave in a presentment to the court in which they say, 'We present as a subject of the most serious complaint the present operations on the batture by Edward Livingston and others connected with him: that this is from 4 to 6 months of every year a part of the bed of the river, and an important part of the port of New-Orleans: that these operations of Edward Livingston are calculated to obstruct the free navigation of the river, to change the course of it's waters, to deprive our western brethren, whose only market for the produce of their extensive territory, is to be found in this city, of the deposit which has hitherto remained free to them, and not only of incalculable importance, but of absolute necessity. Whether it be private or public property, is immaterial, so long as the laws do not permit such use of it as to injure and obstruct the navigation: and we present it as our opinion that all such measures should be taken as are consistent with law to arrest these operations which are injurious for the present, and, in changing the course of the river, are hazardous in the extreme.' We find Mr. Livingston then, instead of await-

Livingston's works.

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ing the decision of Congress, the only constitutional tribunal, resuming his works boldly, and the people, whom he represented as like 'to change the insolence of riot into the crime of murder,' appealing peaceably, by presentment, to the laws of their territory until the National government should decide. In the latter end of the same year, [Surveyor's rep. to Mayor, Dec. 28, '08.] he opens a canal from the bank directly through the beach into the river *276 feet long, 64 feet wide, and 4 feet 2 inches deep at low water, and with the earth excavated, he forms a bank or quai, on each side, 19 feet 6 inches wide, from 4 to 6 feet high above the level of the batture, and faced with palissades. Within one year after this, what had been anticipated by the Governor, the grand jury and others, had already manifested itself. In Dec. of the ensuing year, 1808, [See Surveyor's rep. Dec. 28, '08.] a bar had already formed across the mouth of the canal, which was dry at low water, the course of the waters had been changed during the intervening flood, and the places where dry ground first showed itself, on the decrease of the river, were such as had, the year before, been na-
*20 vigable at low water. [Mayor's *answer to Governor, Nov. 18, '08.] The port in front of the town had been impaired by a new batture begun to be formed opposite the Custom house, which could not fail to increase by the change of the current. The beach or batture of St. Mary had, in that single tide extended from 75 to 80 feet further into the river, and risen from 2 to 5 feet 10 inches generally, and more in places, as a saw scaffold which, at the preceding low tide, was 7 feet high, was now buried to it's top; and Tanesse, the Surveyor, [See his affidavit, MS.] in his affidavit says he does not doubt that these works have produced the last year's augmentation of the batture, at the expense of the bed of the river, have occasioned the carrying away a great part of the platin or batture of the lower suburbs, and breaking the levee of M. Blanque next below, and that the main port of the city being a cove, immediately below Livingston's works, would, if they were continued, be filled up in time; and it is the opinion of Piedesclaux also, [See his 3d affidavit, MS.] that they would produce changes in the banks of the river, on both sides, preju-

* These are French measures; add a fifteenth to make them ours.

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dicial to the city, and riparian proprietors, by directing the efforts of the river against parts not heretofore exposed to it. And Mr. Poydras tells us, [p. 20 of one of his speeches,] that when the river is at it's height, the boats which drift down it can only land in the eddies below the points, as they would be dashed to pieces in attempting to land in the strong current. That, at the town, they cannot land for want of room, there being always there two or three tier of vessels in close contact; nor at the lower suburbs of Marigny, which being at the lower part of the cove, are too much exposed both to winds and current. Indeed no evidence is necessary to prove that in a river of only 1200 yards wide, having an annual tide of 12 to 14 feet rise, which brings the water generally to within 8 or 10 inches, and sometimes 2 or 3 inches, of the top of the levee, insomuch that it splashes over with the wind, [See Peltier's, and Tanesse's affidavits, MS. and also the maps,] were the channel narrowed 250 yards, as Mr. Livingston intends, that is to say, a fourth or fifth of its whole breadth, the waters must rise higher in nearly the same proportion, that is to say, 3 feet at least, and would sweep away the whole levee, the city it now protects, and inundate all the lower country.

Thus urged by the continued calls of the Governor, who declared he could not be responsible for the peace or preservation of the place, by the tumult and confusion in which the city was held by the bold aggressions of the intruders on the public rights, by the daily progress of works which were to interrupt the commerce of the whole western country, threatened to sweep away a *great city and it's inhabitants, and lay the adjacent country under water, I listened to the calls of duty, imperious calls, which had I shrunk from, I should have been justly responsible for the calamities which would have followed. On the 24th of October, '07, the Attorney General had given his opinion, and on the 27th of November, '07, I asked the attendance of the heads of departments, to whom the papers received had been previously communicated for their consideration. We had the benefit of the presence of the Attorney General, and of the lights which it was his office to throw on the subject. We took of the whole case such views as the state of our information at that time presented. I shall now develope them in all the ful- *21

Cabinet deliberation.

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ness of the facts then known, and of those which have since corroborated them.

What law.

The first question occurring was, what system of law was to be applied to them? On this there could be but one opinion. The laws which had governed Louisiana from it's first colonisation, that is to say, the laws of France, with some local modifications, were still in force when this question was generated by the sale of the Jesuits' property to B. Gravier and others. France had indeed, about the end of the preceding year 1762, by a secret convention, ceded Louisiana to Spain, to be delivered whenever Spain should be in readiness to receive it. But this was not announced to the inhabitants till the 21st of April, 1764, nor did Spain receive possession till the 17th of August, 1769. [9 Raynal, 222. 235.] In the mean time the French government and laws continued, the Jesuits' property was sold, and purchased on the faith of the existing laws; and according to these laws must the rights acquired by the purchaser, or left in the crown, be decided. Indeed in no case are the laws of a nation changed, of natural right, by their passage from one to another domination. The soil, the inhabitants, their property, and the laws by which they are protected go together. Their laws are subject to be changed only in the case, and extent, which their new legislature shall will. The changes introduced by Spain, after 1769, were chiefly in the organisation of their government, and but little in the principles of their jurisprudence. The instrument which some have understood as suppressing the French and substituting the Spanish code, is the proclamation of O'Reilly of November 25, 1769, two months after the actual delivery of the colony. [See appendix to documents communicated to Congress by the President, with his message of October 17, 1803.] The transfer of the country, however, had been announced to the people five years before. Now surely, during these five years the *French laws must have continued entire, and of course after them, so far as not altered. And that this proclamation made specific only, and not general alterations, a brief examination of it's tenor will evince. It begins by charging the late council with a par-

Proclamation of O'Reilly.

French code.

*22

ticipation in the insurrection which had taken place, and by declaring it indispensable to abolish that, and to establish the *form* of politic government and administration of justice prescribed by the wise laws of Spain. But a *form* of government may surely be changed, and the mass of the laws remain the same, as took place in our revolution. He proceeds then to establish that *form of government*, *dependance* and *subordination*, which should accord with the good of the service, and happiness of the colony. For this purpose he substitutes a Cabildo, in place of the ancient council, and instead of former analogous officers, he says there shall be Alferes, Alcaldes, Alguazils, Depositors, Regidors, a Scrivener, Procurator, Mayordomo, &c.; adopting thus the Spanish, instead of the French organisation of officers, for the administration of the laws. He changes the manner of proceedings in judicial trials, and of pronouncing judgments, according to a digest made by Unestia and Rey, by his order, *until* a general knolege of the Spanish language and more extensive information on the statutes themselves might be acquired; prescribes rules for instituting actions by parties of different denominations, the names and substance of the pleadings, rules for appearances, answers, replications, rejoinders, depositions, witnesses, exceptions, trials, judgments, appeals, executions, testaments, probates, advancements, and distributions: not changing the great outlines of the law, or the *ratio decidendi* generally; but merely the organisation of officers, and forms of their proceeding. He states also the criminal law, what it is in sundry cases of irreligion, treason, murder, theft, rape, adultery, and trespass, proclaiming mostly what was already law; lastly, he establishes the fees of officers, and with that closes the proclamation, without a word said about abolishing the French, and substituting the Spanish code of laws generally. As far then as this instrument makes any special changes, it's authority is acknoleged. But the very act of making special changes is a manifestation that a general one was not then intended. He did not mean by this instrument to change 'all and some.' One may indeed conjecture, from loose expressions in the instrument, that a more extensive change was in contemplation for some future time, when the inhabitants, as it says, should have acquired a general knolege of the Spanish

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language. But *until* then expressly, and in the interim, the innovations it specifies are the only ones introduced. The
*23 great system of law which *regulates property, which prescribes the rights of persons and things, and sanctions to every one the enjoyment of those rights, is left untouched, in full force and authority. If such a radical change were really meditated, it was never carried into execution; nor seems at any after time to have occupied seriously the attention of government. In the following year 1770, O'Reilly issued an additional ordinance respecting grants of lands; and Carondelet, in 1795, (26 years after possession of the colony, and 8 years only before it's transfer to us,) passed an ordinance of police, concerning bridges, roads, levees, slaves, coasters, travellers, arms, estrays, fishing and hunting; and these three acts seem to constitute the whole of the changes made in the established system of laws during the Spanish occupation of the country. Probably the Spanish authorities found, in the progress of their administration, that the difference between the French and Spanish codes, taken both from the same Roman original, would not justify disturbing the public mind, by a formal suppression of the one, and substitution of the other. Probably the officers themselves, not adepts in either, and partly French, and partly Spanish individuals, confounded them in practice as they found convenient; and hence the ill-defined ideas of what their laws were. But certainly when we appeal, as in the present case, to exact right, the French code is the only one sanctioned by regular authority; and the special changes before mentioned, of organization and police, having no relation to the beds and increments of rivers, that code is to give us the law of the present case. That code, like all those of middle and southern Europe, was originally feudal, [Encyclop. Method. Jurisprudence. Coutume. 400.] with some variations in the different provinces, formerly independent, of which the kingdom of France had been made up. But as circumstances changed, and civilization and commerce advanced, abundance of new cases and questions arose, for which the simple and unwritten laws of
Roman. feudalism had made no provision. At the same time, they had at hand the legal system of a nation highly civilized, a system carried to a degree of conformity with natural reason attained by no other. The study of this system

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duo was become the favourite of the age, and, offering ready and reasonable solutions of all the new cases presenting themselves, was recurred to by a common consent and practice; not indeed as laws, formally established by the legislator of the country, but as a RATIO SCRIPTA, the dictate, in all cases, of that sound reason which should constitute the law of every country.† Over both of these systems, however, the occasional* edicts of the monarch are paramount, and *24
amend and control their provisions wherever he deems amendment necessary; on the general principle that 'leges posteriores priores abrogant.‡ Subsequent laws abrogate those which were prior. This composition of the French code is affirmed by all their authorities. One only of them shall be particularly cited, to wit, Ferriere Dict. de droit. Ordonnance.

'Les Ordonnances sont les vraies lois du royaume. Elles

The Ordinances are the true laws of the kingdom. They con-

† The following instances will give some idea of the steps by which the Roman gained on the Feudal laws. A law of Burgundy provided that 'Si quis post hoc barbarus vel testari voluerit, vel donare, aut Romanam consuetudinem, aut barbaricam, esse servandam, sciat.' 'If any barbarian subject hereafter shall desire to dispose by legacy or donation, let him know that either the Roman or barbarian law is to observed.' And one of Lotharius II. of Germany, going still further, gives to every one an election of the system under which he chose to live. 'Volumus ut cunctus populus Romanus interrogetur quali lege vult vivere: ut tali lege, quali professi sunt vivere vivant: illisque denuntiatur, ut hoc unusquisque, tam judices, quam duces, vel reliquus populus sciat, quod si offensionem contra eandem legem fecerint, eidem legi, quâ profitentur vivere, subjaceant.' 'We will that all the Roman people shall be asked by what law they wish to live: that they may live under such law as they profess to live by: and that it be published, that every one, as well judges, as generals, or the rest of the people, may know, that if they commit offence against the said law, they shall be subject to the same law by which they profess to live.' Encyc. Method. Jurisprudence, Coutume. 399. Presenting the uncommon spectacle of a jurisdiction attached to persons, instead of places. Thus favoured, the Roman, became an acknowledged supplement to the feudal or customary law: but still, not under any act of the legislature, but as 'raison écrite,' written reason; and the cases to which it is applicable, becoming much the most numerous, it constitutes in fact the mass of their law.

‡ Since this publication, Gen. Armstrong, our late Minister at Paris, has sent me a printed copy of Crozat's Charter in French, which he says he obtained directly, and in person from the depôt of laws in Paris, but which he had no means of comparing with the original This printed copy, with Gen. Armstrong's letter, I have deposited in the office of the Secretary of State at Washington. *MS. Note.*

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font la partie la plus générale et la plus certaine de notre droit Français, attendu qu'elles sont soutenues de l'autorité aussi bien que de la raison; au lieu que les loix Romaines ne subsistent que par leur équité, elles n'ont par elles mêmes aucune autorité, qu'autant qu'elles sont considérées comme une raison écrite, du moins en pays coutumier; et à l'égard du pays de droit écrit, les loix Romaines n'y ont force de loi, que parceque nos rois ont bien voulu y consentir.

stitute the most general and certain part of our French law, inasmuch as they are supported by authority as well as reason; whereas the Roman laws stand on their equity alone, having of themselves no authority, but as they are considered as *written reason*, at least in the provinces of Customary law. And as to those of written law, the Roman laws are in force only because our kings have thought proper to consent to it.

This system of law was transferred to Louisiana, as is evinced by the † charter of Louis XIV. to Crozat, bearing date
*25 the *14th of Sept. 1712. The VIIth article of that is in these words. 'Our edicts, ordinances and customs, and the usages of the Mayoralty and Shreevalty of Paris, shall be observed for laws and customs in the said country of Louisiana.' The customary law of Paris seems to have been selected, because considered as the best digest, and that to which it was proposed to reduce the customary law of all the provinces. Enc. Meth. Jurispr. Coutume. 405. This is the first charter we know of which established the boundaries and laws of Louisiana. It says nothing of the Roman law; but that, having become incorporated, by usage, with the customs of Paris, and constituting, as a supplement, one system with them, seems to have been

† The only copy of this Charter I have ever met with is in Joutel's Journal of la Salle's last voyage. An application was made by the government of the United States, through their minister at Paris, to the government of France, for permission to have the original of this charter sought for in their Archives, and an authentic copy obtained. The application was unsuccessful. We must resort, therefore, to this publication, made in 1714, two years after the date of the patent, under the rule of law which requires only the best evidence the nature of the case will admit. For although we may not appeal to books of history for documents of a nature merely private, yet we may for those of a public character, e. g. treaties, &c. and especially when those documents are not under our controul, as when they are in foreign countries, or even in our own country when they are not patent in their nature, nor demandable of common right.

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considered as of their body, and transferred with them to Louisiana.† In 1717, Crozat transferred his rights to the compagnie d'Occident, at the head of which was the famous Law, 8. Raynal. 166. [edit. 1780.] which again in 1720, by union with others, became the Compagnie des Indes, who in 1731, surrendered the colony back to the king. 1. Valin, 20. But these various transfers from company to company, of the monopoly of their commerce, for that was the sum of what was granted them, and their final surrender to the king, could not affect the rights of the people, nor change the laws by which they were governed. When they returned to the immediate government of the king, their laws passed with them, and remained in full force until, and so far only as, subsequently altered by their legislator. That this was the sense of their *government may be inferred from a clause in the edict creating the Compagnie des Indes Occidentales, art. 34. *26

'Seront les juges établis en tous les dits lieux tenus de juger suivant les lois et ordonnances du royaume, et les officiers de suivre et se conformer à la coutume de la Prevôté et vicomté de Paris,

'The judges established in all the said places shall be held to adjudge according to the laws and ordinances of the kingdom, and the officers to follow and conform themselves to the customs of the

† If it be objected that the incorporation of the Roman law with the customs of Paris, and their joint transfer to Louisiana does not appear, I answer, 1. At the date of Crozat's charter, the Roman law had for many centuries been amalgamated with the customary law of Paris, made one body with it, and it's principal part. By the customs of Paris were doubtless meant the laws of Paris, of which the Roman then made an important part, and might well be understood to be transferred with them. It was hardly intended that the new colonists were to unravel this web, and to take out for their own use only the fibres of Parisian customs, the least applicable part of the system to their novel situation. 2. If the term, coutumes de Paris in the charter be rigorously restrained to it's literal import, yet the judges of Louisiana would have the same authority for appealing to the Roman as a supplementary code, which the judges of Paris and of all France, had had; and even greater, as being sanctioned by so general an example. 3. The practice of considering the Roman law, as a part of the law of the land in Louisiana, is evidence of a general opinion of those who composed that state that it was transferred, and of an opinion much better informed, and more authoritative than ours can be. Or it may be considered as an adoption, by universal, though tacit consent, of those who had a right to adopt, either formally, or informally, as they pleased, as the laws of England were originally adopted in most of these states, and still stand on no other ground.

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suivant laquelle les habitans pourront contracter, sans que l'on y puisse introduire aucune autre coutume, pour éviter la diversité.' 1. Moreau de St. Mery, 100.

Prevoté and vicomté of Paris, according to which the inhabitants may contract, without that that any other custom may be introduced, to avoid diversity.' 1. Moreau de St. Mery, 100.

Alluvion. This then is the system of law by which the legal character of the facts of the case is now to be tested: and the plaintiff and his counsel having imagined that, in the Roman branch of it, they had found a niche in which they could place the batture to great advantage, have availed themselves of it with no little dexterity, and by calling it habitually an alluvion, have given a general currency to the idea that it is really an alluvion: insomuch that even those who deny their inferences, have still suffered themselves carelessly to speak of it under that term. Were we, for a moment to indulge them in this misnomer, and to look at their claim as if really an alluvial one, the false would be found to avail them as little as the true name. The Roman law indeed says, 'quod per alluvionem, agro tuo flumen adjecit, jure gentium, tibi adquiritur.' 'What the river adds to your field by alluvion, becomes yours by the law of nations.' Institute. L. 1. tit. 1. §. 20. Dig. L. 41. tit. 1. §. 7. The same law, in like manner, gave to the adjacent proprietors, the sand bars, shoals, islands rising in the river, and even the bed of the river itself, as far as it was contracted or deserted. Inst. 2. 1. 22. and 2. 1. 23. But the established laws of France differed in all these cases.

'Par notre droit Français, dit Pothier, les alluvions qui se font sur le bord des fleuves, et des rivières navigables, appartiennent au roi. Les propriétaires riverains n'y peuvent rien prétendre, à moins qu'ils n'ayent des titres de la concession que le roi leur aurait faite du droit d'alluvion.' 1. Pothier. Traité de la
*27 propriété. *1 Part. c. 2. §. 3. art. 2. No. 159.

'By our French law, says Pothier, one of their most respected authorities, the alluvions formed on the borders of navigable streams and rivers belong to the king. The proprietors of riparian heritages can have no claim to them, unless they have evidences of the grant made to them by the king, of the right of alluvion along their heritages.' Pothier, Part 1. c. 2. §. 3. art. 2. No. 159. cited Derbigny, xviii.

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And Guyot, in the Répertoire universel de Jurisprudence, a work also of authority and cited with approbation by the plaintiff and his counsel, [Liv. 21. Du Ponceau, 14.] under the word 'île,' says,

'Nous n'admettons pas comme les Romains, les alluvions, et les accroissemens, au profit des propriétaires riverains, soit par les changemens qui peuvent survenir dans le lit des rivières, soit relativement aux îles, et îlots qui peuvent s'y former. Chez eux le lit, et les bords des fleuves et rivières étaient censés faire partie des héritages riverains; et par une suite de ces maximes, le terrain qu'un fleuve ajoutait à ces héritages, appartenait à ceux qui en étaient propriétaires. Ils réunissaient de même à leurs possessions le lit que le fleuve abandonnait; et lorsqu'il se formait une île dans le milieu de son lit, les riverains y avaient un droit égal, et en partageaient la propriété. Suivant nos principes, les rivières navigables, leur lit, rives, et tous les terrains qui peuvent s'y former, appartiennent au roi, à raison de sa souveraineté. C'est la disposition précise de l'article 41. du tit. 37. de l'Ordonnance des eaux et forêts de 1669, qui a dissipé tous les doutes que l'on cherchait à faire naître dans plusieurs provinces, sur les fondemens des énonciations qui se rencontraient dans les anciennes concessions.

'We do not admit, as the Romans, alluvions and accumulations to go to the riparian proprietors, either by changes which may happen in the bed of rivers, or relating to isles, and islots which may there be formed. With them the bed and borders of rivers and streams were considered as making part of the riparian inheritances; and as a consequence of these maxims, the earth which a river added to these inheritances, belonged to those who were the proprietors of them. They reunited in like manner to their possessions the bed which a river abandoned, and when an isle was formed in the middle of it's bed, the riparians had an equal right to it, and divided the property. According to our principles, navigable streams, their bed, banks, and all the grounds which may be formed there, belong to the king, in right of his sovereignty. It is the precise provision of art. 41. tit. 37. of the Ordonnance des eaux et forêts, which has dissipated all the doubts which they had endeavoured to raise in several provinces, on the grounds of the enunciations which were found in the ancient concessions.' Cited Derbigny 23.

Again, after laying down the Roman law of alluvion, and of

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islands formed in the beds of rivers, Le Rasle, in the Law Dictionary, forming a part of the Encyclopédie Méthodique. Jurisprud. accession. 94, says,

'Nous n'avons pas suivi dans notre droit Français les
*28 *dispositions Romaines à cet égard; toutes les isles ou autres attérissemens qui se forment dans les rivières appartiennent au roi, et font partie du domaine. Les terres ajoutées par alluvion aux héritages baignés par le fleuve et les rivières navigables, n'appartiennent aux riverains, que lorsqu'ils ont un titre de concession qui leur permet de se les approprier.'

'We have not in our French law followed the Roman provisions in this respect: all islands or other accumulations which are formed in rivers, belong to the king, and constitute a part of the domain. Lands added by alluvion to inheritances washed by rivers and navigable streams, do not belong to the riparians but when they have a deed of concession which permits them to appropriate them to themselves.'

And Ferriere, quoted also by the plaintiff, says,

'Pour ce qui regarde l'augmentation arrivée à un héritage subitement et tout d'un coup, la décision que les loix Romaines ont faites à cet égard n'est point observée dans le royaume. Cette augmentation appartient au roi, dans les rivieres navigables.' And Denizart agrees, 'que les attérissements formés subitement dans la mer, ou dans les fleuves ou rivières navigables, appartiennent au roi, par le seul titre de sa souveraineté.'

'As to augmentations happening suddenly and all at once, the decision of the Roman laws in this respect, is not observed in the kingdom. These augmentations belong to the king in navigable rivers.' And Denizart agrees, 'that atterrissements formed suddenly in the sea, or the navigable rivers or streams, belong to the king in the sole right of his sovereignty.'

And he refers to the edicts of 1683. 1693. and 1710.

And to put aside all further question as to the law of France on this subject, Louis XIV. by an edict of December 15, 1693, says,

'Louis, &c. Greeting. The right of property which we have

'Louis, &c. salut. Le droit de propriété que nous avons sur

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in all rivers and navigable streams of our kingdom, and consequently in all the isles, mills, ferries, &c. accumulations and increments formed by the said rivers and navigable streams, being incontestably established by the laws of the state, as a necessary consequence and dependance of our sovereignty, the kings, our predecessors, and ourselves, have from time to time ordered inquiries as to isles and increments therein formed, &c. For these causes with the advice of our council, and of our certain knolege, full power and royal authority, we have by these presents, signed with our hand, declared, enacted and ordained, and we do declare, enact and ordain, we will, and it is our pleasure that all the holders, proprietors, or possessors, of isles, islots, accumulations, increments, *alluvions*, rights of fishery, tolls, bridges, mills, ferries, packets, bateaux, edifices and imposts on the navigable rivers of our kingdom which shall produce titles of property or of possession before the 1st of April, 1566, shall be therein maintained and secured in their possessions, on paying to the treasury one year's revenue, and those without title papers, or possession prior to the 1st of April, 1566, on payment of two years' revenue.'

tous les fleuves et rivières navigables de notre royaume, et conséquemment de toutes les isles, moulins, bacs, &c. attérissemens et accroissemens formés pas les dits fleuves et rivières, étant incontestablement établi par les lois de l'état, comme une suite et une dépendance nécessaire de notre souveraineté, les rois nos prédecesseurs et nous, avons de tems en tems, ordonné des recherches des isles et crémens qui s'y sont formés, &c. A ces causes, de l'avis de notre conseil et de notre certaine science, pleine puissance et autorité royale, nous avons par ces *présentes, signées *29 de notre main, dit, statué et ordonné, disons, statuons et ordonnons, voulons et nous plait, que tous les détenteurs, propriétaires, ou possesseurs des isles, islots, attérissemens, accroissemens, *alluvions*, droits de pêche, péages, ponts, moulins, bacs, coches, bateaux, édifices et droits sur les rivières navigables de notre royaume, qui rapporteront des titres de propriété ou de possession, avant le 1er Avril, 1566, y soient maintenus et conservés dans leurs possessions, en payant au fisc une année, et ceux sans titre, ni possession antérieurs au 1er Avril, 1566, en payant deux années de revenu.'

Having no copy of this Ordinance, I quote it from Mr. Derbigny, p. 20. Duponceau, p. 10. and l'Examen de la Sentence, p. 8. By putting together the parts they cite, for neither gives

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the whole of what I have cited. Other respectable authorities might be produced, to the same effect, were it necessary to multiply them: and it is also admitted that authorities of weight, and of a different aspect exist, among these is Dumoulin, as respectable as Pothier, Guyot, or any other who has been cited. Were it absolutely incumbent on me, more than on those who rely on the contrary authorities, to assign reasons for a difference of opinion among lawyers, on any point, it might be ascribed in this case to a difference of impression from views of the same subject, diversified as were the customs of the various provinces of France, on this very point. Dumoulin wrote a century and a half before the Ordinance of Louis XIV. In that course of time, printing had become more diffused, books greatly multiplied, and a more correct collation of these customs could be made. So that had Dumoulin written in the days of Pothier and Guyot, and with their advantages, he would probably have concurred in the preceding observation, that 'if there were any doubts, this Ordinance has dissipated them.' Be this as it may, Louis XIV. and his council have decided between these two opinions, and if it were not law before, his decision made it so. By this edict he declares the law of France, 'incontestably,' to be that '*Alluvions* belong to the king in all navigable rivers.' But with a spi-
30 rit of indulgence, meriting more respect than he has found in the language of the adverse party who dislike the truths he has declared, he confirmed all anterior usurpations, on payment of certain compositions and future rents, re-establishing, by the example, the authority of the laws, and rights of the crown against these usurpations. This Ordinance was past 19 years before the charter to Louisiana, and consequently was comprehended among the edicts and ordinances originally established as the law of the Province.

Mr. Livingston and his advocates have asserted that the right to the beds and increments of rivers, is a gift of the feudal system to the sovereign, that is, to the nation, and is a peculiarity of that system: and further, that that system was never introduced into Louisiana. That the latter assertion is palpably erroneous, could be readily shown, were not the question altogether unnecessary. With respect to the former, surely it is putting the cart before the horse to say, that the authority of the nation flows from the Feudal system, instead of the Feudal system flowing

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from the authority of the nation. That the lands within the limits assumed by a nation belong to the nation as a body, has probably been the law of every people on earth at some period of their history. A right of property in moveable things is admitted before the establishment of government. A separate property in lands not till after that establishment. The right to moveables is acknoleged by all the hordes of Indians surrounding us. Yet by no one of them has a separate property in lands been yielded to individuals. He who plants a field keeps possession till he has gathered the produce, after which one has as good a right as another to occupy it. Government must be established and laws provided before lands can be separately appropriated, and their owner protected in his possession. Till then the property is in the body of the nation, and they, or their chief as their trustee, must grant them to individuals, and determine the conditions of the grant. In certain countries they have granted them on a system of conditions and principles which have acquired the appellation of Feudal. Surely then it is the sovereign which has created the Feudal principles, and not these principles which have created the rights of the sovereign. The Edinburgh Reviewers, [No. 30. 339. Jan. 1810.] who in the progress of their work have deservedly attained a high standing in the public estimation, reviewing the condition of land-tenures among the Hindoos, say, 'the territory of the nation, belonging in common to the nation, belongs, in this general sense, to the king, as the head and representative of the nation. As far accordingly as we have sufficient documents respecting rude nations, *we find their kings, *without perhaps a single* *31
exception, recognised as the sole proprietors of the soil.'
And they quote as their authorities,

In Europe.

For Wales, Leges Walliæ. c. 337.

Great Britain. The Bretons while they held the whole island, Turner's Anglo Saxons, c. 3.

Gaul and Germany. Cæsar, 4. 1. To which add Spain, Portugal, Italy and all feudal states.

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In Asia.

For China. Barrow. 397.

India. Montesq. Sp. L. 14. 6. Scott's Ferishta, vol. 2. 148—495. 2. Bernier, 189.

Persia. 3. Chardin, 340. Syria and the Turkish dominions. 2. Volney, 402.

In Africa.

For Egypt. Herodot. 2. 109. Volney passim.

Other parts of Africa. 4. Hist. gen. des voyages 13. v. do. 7. 5. 17. Mod. Univ. Hist. 322. Parke, 260.

In America.

For the Spanish part. Acosta 6. 15. and 18. Garcilaso, 1. 5. 1. Carli. letter 15.

For the United States and the Indian hordes of our continent, we cite our own knolege.

It seems then to be a principle of universal law that the lands of a country belong to it's sovereign as trustee for the nation. In granting appropriations, some sovereigns have given away the increments of rivers to a greater, some to a lesser extent, and some not at all. Rome, which was not feudal, and Spain and England which were, have granted them largely: France, a feudal country has not granted them at all on navigable rivers. Louis XIV. therefore was strictly correct when in his edict of 1693, he declared that the increments of rivers were incontestably his, *as a necessary consequence of the sovereignty*. That is to say, that where no special grant of them to an individual could be produced, they remained in him, as a portion of the original lands of the nation, or as new created lands, never yet granted to any individual. They are unquestionably a regalian, or national right, paramount, and pre-existent to the establishment of the feudal system. That system has no fixed principle on the subject, as is evident from the opposite practices of different feudal nations. The position, therefore, is entirely unfounded, that the right to them is derived from the feudal law; and it is consequently unnecessary to go into the proof of what the
*32 grants in that country *exhibit palpably enough, that infeudations were partially at least, if not generally, introduced into Louisiana.

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It ought here to be observed however that, so far as respects the beds and navigation of rivers, the right vested in the sovereign is a mere trust, not alienable. It is not like lands, imposts, taxes, an article of public property constituting the revenues of the state; but like roads, canals, public buildings, reserved for the use of the individuals of the nation. See an explanation of this subject, Vattel 1. 235. 239.

I have now to advert, and I do it with extreme regret, to a passage in the very able Memoire of M. Thierry, a Memoire conspicuous for it's learning and sound reasoning, and to which I acknolege myself peculiarly indebted for information on the points he has discussed. He says, p. 30. 'To the ancestors of John Gravier the right of alluvion belonged, not only by virtue of the Coutumes de Paris, which for two centuries back acknoleged the principle of the Roman law, and against which, for that reason, the Ordinances of the kings of France could with no manner of success be pleaded, inasmuch as a royal ordinance specially made that Coutume the civil law of this colony; but also by virtue of the Spanish laws, which from 1769 have been constantly in force in Louisiana.' 1. That the Roman principle of Alluvion was acknoleged by the Coutumes de Paris has not been proved. The adverse counsel, [Dupon. p. 9.] has said, indeed, that those Customs were silent on this subject. But I have considered Pothier, Guyot, and Le Rasle as better authority. 2. Mr. Thierry supposes that a Royal Ordinance having specially made that Coutume the civil law of Louisiana, the Ordinances of the kings of France were excluded from the system, and could not controul what was Coutume. He had not, I presume, seen the charter of 1712, which makes the edicts and *ordinances* with the Coutume de Paris, the law of that province; nor sufficiently considered that had the Coutumes been alone established by one ordinance, another might change them. 3. He supposes the Spanish laws have given Alluvions to the riparian proprietor. But the laws of the province, established by their charter, were not annulled by the change of one king for another, as their legislator. The latter might change them. But has he done so? If he has, his edict must be produced, that we may weigh it's words, and judge of it's effects for ourselves. And we must guard against admitting that the example of a Spanish Governor, if such example has occurred,

M. Thierry.

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occasionally and incorrectly acting on the laws of Spain, amounted to a repeal of the whole system then existing, and a formal establishment of a different one. No such intention on
*33 his part, *to make so momentous a change, should be so slightly inferred; and no power of his could effect it, even if intended. Nothing less than an Ordinance of the Sovereign himself, signed with his own hand, and sanctioned by all the solemnities attending their enactment and promulgation, was competent to reverse at once the legal condition of a whole people, and the laws under which their lives and properties were held. Again, even such an ordinance could not change the law as to past rights; and those now in question were vested before the Spanish government took place, and could not be annulled by a subsequent law. These gratuitous admissions, therefore, of Mr. Thierry, not at all necessary to his argument, and therefore probably not well considered, and in opposition to the opinions and demonstrations of an able brother counsellor (Mr. Derbigny), must be disavowed, and the authority of the Ordinance of 1693 insisted on with undiminished confidence. Mr. Thierry himself will perhaps the more readily abandon them, when he sees with what avidity his eagle-eyed adversary has pounced upon them in a letter to some member of the government, in which he considers them as giving up all ground of opposition to his claims.

Edict of Louis XIV.

To that edict then I shall now recur; and to the cavils raised against it by the advocates of the claims it annihilates. It is idle for them to call it bursal, fiscal and the act of a tyrant, &c. [Duponc. 10.] as if the authority of laws was to be graduated by the character of the existing legislator; and as if we were to be the judges, for other nations, of the character and obligation of their laws. It is vain to pretend that because the word 'Alluvion,' inserted in the enacting clause of the edict, is not in the preamble, therefore it has no force in the body of the law: as if the preface, giving the general reason and views of a law, was alone to be the law, and it's actual enactments a mere nullity. Although the preamble of a statute is considered as a key to open the mind of the makers as to the mischiefs in their view, yet in general it is no more than a recital of some inconveniences, which does not exclude any other for which the enacting clauses provide; nor must the

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general words of an enacting clause be restrained by the particular words of the preamble. 6. Bac. Abr. Statute. I. 2. and the authorities there cited. So says our law; so says reason; and so must say the Roman law, if it be ratio scripta. But it is further to be observed that the words 'atterrissements and accroissements,' accumulations and increments, used in this preamble are generic terms, of which 'Alluvion' is a species, and therefore strictly comprehended by it. This is proved by the Roman definition, 'Alluvio est *incrementum** latens,' 'alluvion est un accroissement ou crement imperceptible,' by the Napoleon code cited by Mr. Livingston: *34

Napoleon Code.

'Les attérissements et accroissements qui se forment successivement et imperceptiblement aux fonds riverains d'un fleuve, ou d'une riviere, s'appellent Alluvion.' §. 556.

'The accumulations and increments which form themselves successively and imperceptibly against the riparian lands of a river or stream, are called Alluvion.' Sect. 556.

And by the edicts of 1686 and 1689, both of which have the expression '*crémens* qui s'y sont formés, soit par *alluvion*, ou par industrie,' &c. And here Portalis's rhetorical flourish, on presenting this law, is cited, [Duponc. 17. Liv. 22.] with triumph, as declaring that this law terminates the great question of Alluvion, and decides it conformably to the Roman law. It is very true indeed that it has terminated the question as to future cases, by changing the law, by transferring the right of Alluvion from the sovereign to the riparian proprietor, by giving the abandoned bed of a river, as an indemnification to him on whose land it has opened a new passage, and making this the future law of all the provinces. And had Louisiana then been subject to France, the law would have been changed *thenceforward*, for Louisiana also. I find no fault with Napoleon for this Roman predilection. I believe the change is for the better so far as concerns rural possessions. A decision too of the parliament of Bordeaux is quoted by Mr. Duponceau 19. to prove that the law giving Alluvion to the adjacent possessor has been acknoleged in France by the decision of the parliament of Bordeaux, confirmed, *as he has heard*, on appeal by the parliament of Paris. This proves only that the

Portalis.

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Roman law of alluvion was the law of the Generality of Bordeaux, not that it was then the law of all France. In the country called the Bordelois, Customary laws prevail. But

'Lorsque la coutume de Bordeaux ne s'est pas expliquée sur certains points de droit, ce n'est ni à la coutume de Paris, ni à d'autres coutumes qu'on a recours pour les faire décider, mais au droit écrit.' Enc. Meth. Jurisp. Bordeaux.'

'When the Custom of Bordeaux has not sufficiently explained itself on certain points of law, it is neither to the Customs of Paris, nor to other customs that recourse is had for decision, but to the written law,' that is, the Roman law.

The inference then is, either that the Coutume de Bordeaux was the same on this point as the Roman law, or, that being silent, the Roman law was recurred to.†

*35 *Surely never was the urgency of squeezing argument out of every thing so apparent, as in the emphasis with which the adverse party presses and comments, [Liv. 32.] on the answers of the several tribunals, to which the Napoleon Code was referred for consideration and amendment. A dozen tribunals are named, with an &c. for more, who are acknoleged to have said nothing about alluvion: and this is produced as proof that it had belonged before to the riparian proprietor. But it proves more probably that these tribunals were contented with the change proposed, and had no amendment of it to offer. But, in truth, it proves nothing either the one way or the other. The tribunal of Paris is then quoted, with an acknolegement that they do not make a single observation on the subject. Then long extracts from that of Rouen, proposing that *islands*, rising in the rivers, shall be given to the riparian proprietors: and recommendations to the same effect from those of Toulouse and Lyons. Now it is remarkable that neither the word 'Alluvion,' nor the idea of the thing, is either expressed or referred to in any one of these quotations. And yet Mr. Livingston says, 'we find all these learned men either passing over these articles, as merely declaratory of the old law, or else *expressly acknoleging them* as

† M. Moreau de Lislet assures us that he was in Paris at the time of the decision of this appeal from Bordeaux, that the decision of Bordeaux was reversed by the king and council, then referred to the parliament of Paris, and the reversal confirmed by that body. See his Memoire, 50.

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such; and again after the citation from Rouen, 'here we have the positive declaration of a learned tribunal, &c. deciding that the edicts did not extend to alluvions, but only to islands in navigable rivers.' And yet I repeat that neither the word nor the idea is to be found in any one of the quotations; for it is of these only I can speak, not possessing the book, but I presume Mr. Livingston's quotations are of the strongest passages. It is impossible to characterise such reasoning respectfully. I shall therefore leave it to the reflection of others. And I think myself authorised to conclude on the whole, that had the Batture been really an Alluvion, it's ownership was to be decided by the laws of France; and that Louis XIV. with the advice of his council, certainly knew when they declared what the law of their country 'incontestably' was; and if we, with our scanty reading on the subject, at this day and distance, know better than they did, yet the enacting clause of the edict made it the law *thenceforward;* that it came over as law for Louisiana, made the batture, if an alluvion, the property of the sovereign; and certainly the whole tenor of the conduct of the Spanish government proved that they did not mean to relinquish it.

Before we quit this branch of the discussion, it is not amiss to *observe that the eloquent declamations of these learned men of Rouen, so much eulogised by Mr. Livingston, were not at all heeded. The Napoleon code, §. 560. retained the *islands* rising in the beds of navigable or floatable rivers, and (changing the French law only as to alluvions) declares, §. 538. in opposition to the Roman law, that *35

'Les fleuves et rivieres navigables ou flottables, les rivages, lais et relais dela mer, les ports, les havres, les rades, &c. sont considérés comme les dépendances du domaine public.'

'Rivers and navigable or floatable streams, shores, increments and decrements of the sea, ports, harbours, roads, &c. are considered as dependences of the public domain.'

So that notwithstanding the 'persuasive and conclusive arguments of these first lawyers of the country,' Liv. 31. the French law as it stands at this day, and stood before, would have given

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the batture to the public, being unquestionably the *rivage or shore of the river.†

* 'Rivage, is most commonly used for the shore of the *sea*, but correctly also for the shore of a river.

'Chaque fleuve, chaque ruisseau
A partout franchi son rivage.' Regnier. Dict. de Richelet. Rivage.
'Le Tybre écumeux et bruyant
De sa course fougueuse étonne son rivage.' St. Evremont.

It is particularly so used in Law. 'Sous le nom de *rivage* est compris le chemin qui doit être entretenu le long des côtes et rivières navigables, pour le hallage des bateaux.' And again, 'droit de rivage, qui est dû sur les marchandises qui abordentau rivage de la ville de Paris.' Dict. de Trévoux, Rivage. 'Sur le rivage de la Seine.' Dict. de l'Académie.

† Little versed in French jurisprudence, possessing few of the authors teaching it, and, of some of those quoted by the adverse party, so much only as they have thought to their advantage to quote, I had apprehended it possible (pa. 29.) that there might be among those authors, that conflict of opinions on the law of alluvions, which these quotations indicate. But I have lately had an opportunity of reading in MS. a Memoire on the subject of the Batture, written by M. Moreau de Lislet of New-Orleans, a French lawyer of regular education in the profession, who has treated the subject, generally with great learning and abilities, and especially that branch of it which relates to the laws of France in cases of Alluvion. He has proved that the doctrines of these great authorities are not contradictory, and that a proper attention to the different questions under contemplation in the passages quoted, will shew that all are right, and all in perfect harmony. To elucidate this he explains certain principles of French law, which mingling themselves with this subject, have occasioned the misunderstanding with which we have been perplexed. 1. The laws of France leave to the king a right to *navigable* rivers only, and their increments. On rivers *not navigable*, the rights of the riparian proprietor prevail as under the Roman law. See Pothier ante. pa. 26. Very early however these rights were drawn into question by the Feudal Superiors, who, looking to the example of the king in the case of *navigable* rivers in his kingdom, claimed similar rights on those *not navigable* within their Seignories. But repeated decisions have condemned their claims, and confirmed the rights of the riparian tenant. 2. By the laws of France, as by those of England, lands received by inheritance, descend, on the death of the tenant, to the heirs of that branch, paternal or maternal, from which they came to him. But those he acquires by purchase (acquets) pass to that line of heirs of which himself is the root. When therefore, to a maternal inheritance an acquisition happened to be made by means of Alluvion, a question would arise, between heirs of different lines, to which of them the Alluvion would descend; whether to the direct heirs of the decedent, as being an acquisition first vesting in him, or to the maternal heir as an accessory to his inheritance. The decisions were that it united with the inheritance, became a part of that, and passed with it. 'Incrementum alluvionis nobis adquiritur, jure quo ager augmentatus primum ad nos pertinebat; nec istud incrementum censetur novus ager sed pars primi.' 'The increment of Alluvion is acquired to us in the right in which the field

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*37 *I will now proceed further and say, that had the batture been an alluvion, and to be decided by the Roman, instead of the French law, the conversion of the plantation

augmented first belonged to us.' Nor is the increment considered as a new field, but a part of the first.' Renusson. It follows that questions of Alluvion would often arise in cases wherein the king's rights were not at all concerned. They would arise between Lord and vassal, and between individual heirs of different lines. These explanations premised, M. Moreau takes a review of the passages quoted from Henrys, Bourjon, Dumoulin, Ferriere, Pothier, Le Rasle, Renusson, Dargentré, Denisart and Guyot, and shews that in every instance where the question concerned a *navigable* river, there was no division of opinions as to the validity of the king's right; and that in every instance where the riparian right is asserted, the question has been between private individuals, or concerning rivers *not navigable*. Recurring then to the edicts and Ordinances placing this right of the king beyond cavil, he observes that a practice had prevailed from early times among riparian proprietors of usurping on the rights of the crown to the increments adjacent to them, and a necessary reaction of the crown, by reclamations and resumptions, to preserve it's own. And he gives a detail of the edicts on this subject proving that that of 1693 instead of being the singular act of a particular prince, whom the adverse party delights to revile, was one only of a long series preceding and following it.

1554. An edict was issued requiring the proper officers to be vigilant in watching over the king's rights in islands, atterrissements, et *alluvions*, comme ils l'ont accoutumes faire d'ancienneté.' So that it was even then a law and practice d'ancienneté, and expressly including *alluvions*.

1664. An Ordinance for making enquiries concerning islands, accroissements, &c.

1668. Apr. An Edict quieting possessions of these objects of 100 years continuance, on paying a vingtieme annually.

1669. The Ordonnance des eaux et forêts, 'qui accorde au roi la propriété de toutes *les rivières navigables*, de leur lit, *rives*, et de tous les terreins qui peuvents s'y former,' Guyot, ante. pa. 27. 'granting to the king the property in *all navigable rivers*, their bed, *banks*, and the grounds forming there.'

1683. Apr. A declaration, reciting that as the rivers belong to the king 'tout ce qui se trouve renfermé dans leur lit, comme les isles, accroissemens et attérissements lui appartient aussi,' confirms *title* anterior to 1566 without condition, possessions anterior to 1566 on conditions, and reunites all others to the crown.

1686. Apr. } Two edicts for Languedoc and Bretagne, confirming possessors
1689. Aug. } in the said islands, 'ensemble des crémens qui s'y sont formés, et de ceux qui pourraient s'y former à l'avenir, soit par *alluvion*, ou par industrie.'

1693. An Edict general for the kingdom 'le droit de propriété que nous avons *sur tous les fleuves et rivières navigables* étant incontestable, &c. Ordonnons que les détenteurs des isles, islots, attérissemens, accroisse-

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of Gravier into a *suburb, made it public property. And here I rejoin with pleasure the standard of M. Thierry, and avail myself of his luminous discussion of this point. Were *38

mens, alluvions, &c. *sur* les *rivières navigables*, &c. as more at large pa. 28.

1710. Feb. An Edict confirming possessions of islands, &c. of the sea on specified terms, copied almost verbally from that of 1693, using the word *alluvions* as that does, and referring to the provisions of that edict.

1722. Sep. An Arret resuming isles, attérissemens, &c. formed since the edict of 1693. And those of anterior formation where the possessor has not made the payments provided by the edict of 1693.

But this whole branch of the argument of M. Moreau must be read with attention. Its matter cannot be abridged, nor otherwise expressed, but for the worse.

Having thus luminously reconciled the authorities which had been so ill understood, and victoriously established the public right to alluvions on *navigable rivers*, M. Moreau, with too much facility, gives back to his adversary one half the ground he has conquered, by a gratuitous admission, which those interested in the event of the cause are not ready to confirm. Led away, as it seems, by an expression in the edict of 1683, 'tout ce qui se trouve renfermé *dans leur lit* nous appartient,' and which is to be found in no other, and yielding to a single decision of the Parliament of Paris of 1765, found in a law dictionary, which adjudged that the Ordinances giving to the king the isles which are formed '*dans le lit*' des fleuves et rivières navigables, ne lui donnent pas les attérissements et *alluvions* qui peuvent se former *hors* le lit de ces mêmes fleuves,' &c. He admits that though alluvions *within* the bed of a river belong to the king, those *without* the bed do not belong to him. M. Moreau is too reasonable to consider as a compliment to himself the adoption of an opinion on his authority alone, by any one not convinced by his reasonings. Certainly I do not feel myself competent to enter the lists with him, on any question of difficulty in the French law. Yet after maturely considering the authorities appealed to in this case, and which he has rendered so strong by reconciling and forming them into one mass, I cannot yield, as he does, so imposing a mass to a single decision of the single Parliament of Paris. I still must consider all alluvions on *navigable rivers* as belonging to the nation, and will briefly assign my reasons.

1. It is of the essence of *Alluvion* that it be, not *in* the bed of the river, but *out* of it; that is, adjacent to the bank. So say expressly the Roman and French definitions. 'Alluvio est incrementum *agro* tuo flumine adjectum.' 'l'Alluvion est un accroissement de terrein qui se fait *sur les bords* des fleuves, par les terres que l'eau y apporte, et qui se consolident pour ne faire *qu'un tout avec la terre voisine*.' Ante. pa. 26. Increments *within* the bed of a river, though sometimes carelessly spoken of under the term *alluvion*, are never so in correct language, never in the well weighed diction of ordinances and statutes. They are termed accroissements, attérissements, assablissements, isles, islots, javeaux in French, and in our language shoals, shallows, flats, bars, islands. *Without* the bed of the river, they add to the beach, or to the adjacent

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I fully to go into it, I could *but repeat his matter. *39
I shall therefore give but a summary view of it, and rest on his argument for it's more detailed support.

field, according to their elevation, and in this last case only, constitute *Alluvion, within* the bed of the river they lose that name.

2. 'Les alluvions qui se forment *dans* le lit des fleuves' is not the language of the edicts cited by Moreau himself, not even of that single one on which this opinion is founded. That has indeed the expression 'dans les lits,' but applied, not to alluvions, but to isles, accroissements, attérissements, to which it is applicable with truth and correctness. These are the kinds of increments it enumerates, and describes as being 'dans le lit.' If they are enumerated *exempli gratiâ* only as the word *comme* seems to imply, and alluvions, though not named, were within the purview, as they are within the reason of the law, then, if the thing itself is to be understood as if expressed in the text, it's true description also is to be understood as if expressed, that is to say, it's adjacence to the bank. The edicts of 1686 and 1689 mention 'les isles des rivières navigables, ensemble les crémens qui *s'y* sont formés.' That of 1693 says, in like manner, 'le droit &c. *sur* tout les fleuves, et les isles et crémens qui *s'y* sont formés,' and again 'isles et alluvions *sur* les rivières navigables,' not '*dans leurs lits*.' That of 1710 says 'possession des isles et *alluvions sur* les dites rivières.' Thus we see that wherever the edicts mention *alluvions*, they describe them as *sur* le fleuve, not *dans le lit* du fleuve. When they speak of those increments which are *dans le lit* des fleuves, they name them as accroissemens, attérissemens, &c. but not as *alluvions*.

3. This distinction is founded on a single decision of a single parliament, and on the authority of a king's advocate, Bacquet, and the dictum of Salvaing there cited, all perhaps influenced by the same and single expression in the ediet of 1683. It is cited too from a Dictionary by Prost de Royer, where it is doubtless stated in abridgment only, and possibly with the omission of circumstances, arguments, and expressions which, were they before us, would change the aspect of the case, as M. Moreau himself has shewn to be so possible in his review of the mutilated authorities produced by the adversary. And are we, for this, to give up the doctrines of Pothier, Denisart, Ferriere, and the host of other great authorities, and all the definitions of the Roman and French laws, all of which when speaking of *alluvions*, place them exclusively on the borders, and not in the beds of rivers? I cannot do it.

4. This distinction is new in this cause, having never been claimed by the plaintiff or his counsel, or suggested by any other who has treated the question. This naturally begets a suspicion that it is peculiar; though doubtless the adversary will adopt it with avidity. And is he entitled to this gratuitous aid? Is it the equity of his cause, or even it's honesty, or it's utility, which gives him this claim on our tenderness? I cannot consent to a concession which gives the Batture from the public in the contingency of it's being considered as a real alluvion, consolidated with, and making part of, the adjacent field. On the contrary I insist on the public right in this case also, under the laws of France, as hitherto understood, and as declared by her highest authorities.

5. I adhere to this ground the more firmly, because I observe, from another

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Rural and Urban.

The position laid down is that the Roman law gave alluvion only to the rural proprietor of the bank; urban possessions being considered as prædia limitata, limited possessions. The law which gives this right is expressed in the Institutes in these words, 'quod per alluvionem *agro* tuo flumen adjecit, jure gentium tibi adquiritur.' Inst. 2. 1. 20. 'What the river has added, *agro tuo*, becomes yours by the laws of nations.' And the Digest 41. 1. 7. 1. in almost the same words says, 'quod per alluvionem *agro* nostro flumen adjecit, jure gentium nobis adquiritur.' In both instances it is to the possessor *agri* only that it is given. It becomes material therefore to understand rigorously the import of the word *ager*, in the Roman laws; and it happens that it's definition is given critically by the same authority which
40* uses it. 'Locus sine ædificio, in urbe *area*, *rure autem *ager* appellatur, idemque *ager*, cum ædificio, *fundus* dicitur.' Dig. 50. 16. 211. 'Quæstio est, fundus a possessione, vel agro, vel prædio quid distet?' Ib. 115 *in notis*, 'fundus est ipsum solum: eo si utimur, prædium di-

part of his Memoire, pa. 99. that M. Moreau himself seems not very decided in this new opinion. After stating the mischief of Mr. Livingston's works, he says 'it is to prevent a like abuse that the Roman and Spanish laws of haute police, which I have cited, are opposed to every species of works undertaken on the banks of rivers and navigable streams, the effect of which might be to extend the limits of riparian fields, compromiting the public safety, and injuring the facility of navigation. It was with this view, and not to create fiscal resources for himself that Louis XIV. renewed the Ordinances which ascribed to the sovereign the property in rivers and navigable streams, and of whatever is contained in their bed. For if it be advantageous to navigation that the king should be proprietor of the islands which form themselves in navigable rivers, the same interest requires still more that he should be proprietor of the *alluvions* and increments formed *along the shore itself*, since any ownership of these objects, except that of the sovereign, might oppose obstacles to the free landing on the shore, which every one ought to have, and to the use of it which the law gives to the public.'

Considering this admission then, as doubted by M. Moreau himself on a second and sounder view of it, I conclude that the law is accurately laid down by Pothier [ante. pa. 26.] 'By our French law, alluvions formed on the borders of *navigable* streams and rivers belong to the king. The proprietors of riparian heritages can have no claim to them, unless they have documents of the grant made them by the king, of the right of alluvion along their heritages. With respect to alluvions formed along the borders of a river *not navigable*, the property of which belongs to the proprietors of the neighbouring heritage, the dispositions of the Roman law are to be followed.'

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citur. *Ager* esse potest sine villâ.' 'Ground, without a building, in a city is called *area*, but in the country *ager*.' Pliny 1. 6. affirms that *ager*, is derived from the Greek ἀγρὸς, of the same import. And in the Greek Pragmatics of Attaliata tit. 45. the law of alluvion uses 'ἀγρὸς' for *ager*. Τὸ ἀνέπαισθήτως διὰ τὸν ποταμὸν προσλαθὸν τῷ ἀγρῷ μου περίσχωσις ἐστιν, ἥτις προσκλυσις, καὶ ἐμοὶ ἀρμόζει' Quod insensibiliter τῷ ἀγρῷ μου per flumen adjectum est, alluvionis est, et mihi competit. 'What is insensibly added by the river *agro meo* is alluvion [*adundatio*, *adaggeratio*] and belongs to me.' In the same title 'ὅπερ ἐν τῷ ἀγρῷ σου σπείρω τοῦτο ἐστιν.' 'What I sow ἀγρῷ σου *agro tuo*, in your *field*, is yours.' And Stephens, in his Thesaur. ling. Gr. voce 'Ἀγρὸς' translates it 'rus, ager,' 'ἐν ἀγρῷ in agro, ruri. Ἐξ ἀγροῦ, ex agro, rure. 'Εἰς ἄγρον in agrum, rus.' And he cites examples: 'Νηῦς δέ μοι ἥδ' ἑστηκεν ἐπ' ἀγροῦ, νόσφι πόληος'. Hom. Od. 1. 185. 'My vessel is stationed in the *country*, apart from the city.' 'Διὰ τὸ μὴ μεγάλας εἶναι τότε τὰς ΠΟΛΕΙΣ, ἀλλ' ἐπὶ τῶν ΑΓΡΩΝ εἶναι τὸν δῆμον ἄσχολον ὄντα' Aristo. Polit. 5. 'Because, the *cities* not being then large, the people were occupied in the *country*,' where ἀγρὸς is proved to be pointedly the contradistinction to πόλις, to wit, the *country* to the *city*. From these definitions it appears that the word *ager*, in the law, constantly means a field, or farm, in the country, and that a city lot is called *area*. In towns, the whole bank and beach being necessary for public use, the private right of alluvion would be inadmissible; and the adverse counsel have been challenged [Thierry, 33.] to produce a single instance, under the Roman law, of a claim of Alluvion allowed in a city. To this might be added a similar challenge as to the laws of England. These give alluvion on rivers, as the civil law does, to the riparian proprietor. Bracton L. 2. c. 2. § 1. Fleta. L. 3. c. 2. Can they from the volumes of English law, with which they are so much more familiar, produce one single instance of the private right of alluvion allowed in a city? In England, I mean, and not in America, where special circumstances have prevented attention to the law on this subject, or the breach of it. And this must be from the reason of the thing alone, because the common law never having been, like the civil law, reduced to a text, no verbal criticisms on a text can have co-operated against the claim.† Repeating, *therefore, my 41*

† Since this was written, I have seen the case of Smart v. the magistrates, town council and community of Dundee, reported in 8 Brown's Reports of

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reference to the reasoning and authorities of M. Thierry on this point, and my own conviction of their soundness, I consider it as established that, were this question to be decided by

Appeals in parl. 119. This was an appeal from the court of Session in Scotland to the H. of Lords. The crown of Scotland had, in very antient times, granted to the Corporation of Dundee, on the river Tay, the borough, with all the lands and pertinents, the privileges, profits, customs, ports, and liberties of the river on both sides, as freely in all respects as is possessed by the borough of Edinburgh over that of Leith, and in a word, as it seems, every right, power and trust which the crown could grant.—Smart, the proprietor of a lot bounded on one side per fluxum maris, or the sea flood, admitting that the sovereign, as trustee for the public, has a right to prevent all such appropriation of the sea shore, or the banks of navigable rivers as would impede navigation, render it dangerous or hurt the interests of commerce, either inland or foreign, and that all private persons or corporations, having a grant of a port and harbour, possess to a certain extent, the same privileges as derived from the sovereign within a defined space, still he insisted on the right of the adjacent proprietor to ground gained from the sea by it's recess, or by his own industry in embanking, or by any other opus manu factum, *not prejudicial to navigation or the established rights of others*. On the other hand the corporation claimed, by their grant, a right to the seashore adjacent to the town, *in trust for the benefit of the community*, to make harbors, basons, and works for securing them, market places, wharves, wood yards, and other repositories for the accommodation of the trade, and, for these different works, to take in scites from the water by embankment, in short, as standing in the place of the crown, that they succeeded to all the cares and powers of the crown, in the territory and it's waters, for the public good; and, for that object, were now engaged in making an embankment adjacent to the Appellant's lot, for the benefit of navigation and commerce. They admit the general doctrine of the riparian right to the soil which may be acquired from a sea or river, by it's receding naturally, or by industry: but that this does not apply to the site of a *tenement within a burgh*, where the corporation is entitled to all the soil not expressly granted away: that the words, 'per fluxum maris' are but words of description, which were accurate too at the date of the grant, but have since become otherwise by a change of character in the boundary, not in the area granted. They are a limitation of the subject of the grant in the same way as a road would be, which, if removed farther off, would not carry the granted subject with it; or as the tenement of another would be; and make it an *ager limitatus*, not an *ager arcifinius;* the particular boundaries being named, not to limit the coterminous property, but the property granted. The Appeal was accordingly dismissed by the House of Lords. No arguments of counsel, other than the written pleadings, nor reasons of the Lords, are reported: but, from this case, (crowded as it is with circumstances, many of which are irrelevant to the merits of the question, and of those relevant, not the words but the condensed substance is here given,) the book says, that the general principle to be gathered is that 'where the sea flood is stated as the boundary of pre-'mises granted on the shore of *a sea-port being an incorporated borough*, this does 'not give the grantee a right to follow the sea, or to the land acquired from

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the Roman law, the conversion of the farm into a fauxbourg of the city passed to the public all the riparian rights attached to it while a rural possession, and among these the right of alluvion.

Principal and accessory.

And, if the right of alluvion is not given to urban proprietors, much less would it to a mere holder of the bed of a road. But did any one ever hear of a *man's holding the bed of a road, and nothing else? Is it possible to believe that Bertrand Gravier, in selling his lots, *face au fleuve*, really meant to retain the bed of the road and levee? That a man, having a road on the margin of his land, which is it's boundary, should mean to sell his land to the road, and to retain that by itself? a thing of no possible *use* to him, because the *use* being in the public, he could never employ it in agriculture orother wise. Were all this possible, yet this bed of a road, this "labrum amnis" would be no *ager*, no field to which the right of alluvion could attach. That right is but an accessory, or, in the language of our law, an appendage or appurtenance, and an accessory, not to a mere line, but to something of which it can become a part. Had the law, therefore, ever given alluvion to any but the holder of an *ager*, of a field, yet the general doctrines of principal and accessory, would not have carried the benefit to Bertrand Gravier in this case. 'Accessorium sequitur naturam sui principalis. Et in accessoriis, præstanda sunt quæ in principali. Accessorium non tenet sine principali. Sublato principali, tollitur et accessorium.' These are maxims of the civil law. Calvini lexicon jurid. 'An accessory follows the nature of it's principal.' If the accession then be to a field, it becomes part of the field; if to a town, it would become part of the town; if to a road, the use of which belongs to the public, it would be to the road, and to the public. It must follow the nature of it's principal, and become a part of that, subject to the same rights, uses and servitudes with that: and Bertrand Gravier had no right of use in the principal, that is, of the road and levee. 42*

'it, or left by it where it has receded, in prejudice of the *corporation* having, 'by their charter, a right vested in them to the whole territory of the burgh.' And consequently, in prejudice of the *king*, or *public*, where no such grant has substituted others in their place: and it authorises a strong inference that the English, like the Roman law, restrains the right of alluvion to the *prædium rusticum*, not admitting it on the shores bordering the city.

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The equity on which the right of alluvion is founded is, that as the owner of the field is exposed to the danger of loss, he ought, as an equivalent, to have the chance of gain. But what equitable reason could there be, in the present case, for giving to Gravier, the benefit of alluvion, when he could lose nothing by alluvion? If the levee and bank were washed away, they would not go to his plantation, back of the suburb, for a new one. The public would have to purchase a new bed for a road from the adjacent lot holders. Then 'qui sentit onus, sentire debet et commodum.'

Beach or Batture not Alluvion.

But I do deny to the Batture every characteristic of Alluvion.

The French and Roman law constituting that of the place, let us seek from them the definition of Alluvion. The Institute 2. 1. 20. gives it in these words, and the Digest. 41. 1. 7. § 1. in almost verbatim the same.

'Quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici quod ita paulatim adjicitur, ut intelligi non possit quantum quoquo temporis momento adjiciatur.'

'What the river adds by alluvion to your field becomes yours by the law of nature. Alluvion is a latent increase. That seems to be added by alluvion, which is so added by degrees, that you cannot conceive how much in each moment of time is added.'

And in the Greek version of Theophilus, the words, 'Alluvio est incrementum latens' are rendered 'ἀλυβίων ἐστιν ἡ προσκλυσις ἢ προσχωσις,' translated by Curtius 'Alluvio est adundatio vel adaggeratio.' Retaining only the words of this paragraph which are definition it will stand thus.

'Alluvio est incrementum [*adundatio*, *adaggeratio*] agro tuo flumine adjectum, ita latens et paulatim, ut intelligi non possit quantum quoquo temporis momento adjiciatur.'

'Alluvion is an increment [an *ad-undation* or *ad-aggeration*] added by the river to your field, so latent and gradual, that the quantity added in every moment of time cannot be known.'

This is the Roman definition.

In the Law Dictionary of the Encyclop. Method. *voce* 'Alluvion' by Le Rasle, the definition is:

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'Alluvion, un accroissement de terrein qui se fait peu-a-peu sur les bords de la mer, des fleuves, et des rivières, par les terres que l'eau y apporte, et qui se consolident pour ne faire qu'un tout avec la terre voisine.'

'Alluvion, an increment of ground which is made by little and little on the border of the sea, rivers or streams, by earth which the water brings, and which is consolidated so as to make but one whole with the neighbouring ground.'

To reduce the essential members of the Roman and French definitions to a single one, according with our own common sense, for certainly we all understand what alluvion is, I should consider the following definition as comprehending the essential characteristics of both.

1. 'Alluvion is an extension which the waters add insensibly.
2. By apposition of particles of earth.
3. Against the adjacent field.
4. And consolidate with it so as to make a part of it.'

'Incrementum flumine adjectum latens et paulatim.

{ *προσχωσις*, adaggeratio.
{ *προσκλυσις*, adundatio.

Agro,

Qui se consolide pour ne faire qu'un tout avec la terre voisine.

I take this to be rigorously conformable with the French and Roman definitions, as cited from the authorities before mentioned, and that it contains not one word which is not within their unquestionable meaning. Now let us try the batture by this test.

1. 'Alluvion is an extension which the waters add insensibly.' But the increment of the batture has by no means been *insensible*. Every swell of 6 months is said [Derb. xix.] to deposit usually nearly a foot of mud on the whole surface of the batture, so that, *when the waters retire, the increment is visible to every eye. And we have seen that, aided by Mr. Livingston's works, a single tide extended the batture from 75 to 80 feet further into the river, and deposited on it from 2 to 7 feet of mud, insomuch that a saw-scaffold, 7 feet high when the waters rose on it, was, at their retiring, buried to it's top. This increment is, surely, not insensible. See the Mayor's answer to the Governor, Nov. 18, '08. MS. 44*

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2. 'By *apposition* of particles of earth,' or, by their *adhesion*. But the addition to the batture is by *deposition* of particles of earth on it's face, not by their *apposition*, or *adhesion* to the bank. It is not pretended that the bank has extended by apposition of particles to it's side, one inch towards the river. It remains now the same as when the levée was erected on it. The deposition of earth on the bottom of a river, can be no more said to be an apposition to it's sides, than the coating the floor of a room can be said to be plaistering it's walls.

3. 'Against the adjacent field,' la terre voisine. Not a particle has been added to the adjacent field. That remains as it was, bounded by the identical line, *crepido*, or *ora terræ*, which has ever bounded it.

4. 'And consolidated with the field so as to make part of it.' Un tout avec la terre voisine. Even supposing the continuity of the adjacent field not to be broken by the intervention of the levée and road, nothing is consolidated with it, not even with the *margo riparum*, or chemin de hallage, if there be any, between the levée and brim of the bank. No extension of it's surface has taken place so as to form one with the former surface, so as to be a continuation of that surface, so as to be arable like that. The highest part of the batture, even where it abuts against the bank, is still materially below the level of the adjacent field. A terrass of some feet height still separates the field from the deposition called the batture. It is now as distinguishable from the adjacent field as it ever was, being covered with water periodically 6 months in the year, while that is dry. Alluvion is identified with the farmer's field, because of identity of character, fitness for the same use: but the batture is not fitted for ploughing or sowing. It is clear then that the batture has not a single feature of Alluvion; and divesting it of this misnomer, the whole claim of the plaintiff falls to the ground: for he has not pretended that it could be his under any other title than that of Alluvion.

We will now proceed to shew what it is, which will further demonstrate what it is not.

Bed, Beach, Bank.

In the channel, or hollow, containing a river, the Roman law has distinguished the *alveus*, or bed of the river, and the *ripa*, or bank, the river itself being *aqua*, water. 'Tribus constant flumina, alveo, aqua, et ri-

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pis.' Dig. 43. 12. *not. 1. All above high water mark! *45
they considered as *ripa*, bank; and all below as *alveus*, or bed. The same terms have the same extent in the language of our law likewise. But we distinguish, by an additional name, that band, or margin of the bed of the river, which lies between the high and the low water marks. We call it the *beach*. Other modern nations distinguish it also. In Spanish it is *playa*, Ital. *piaggia*, in French *plage*, in the local terms of Orleans it is *batture*, and sometimes *platin*.† In Latin I know of no term which applies exactly to *the beach of a river*. *Litus* is restained to *the shore of the sea*, and there comprehends the beach, going to the water edge, whether at high or low tide. '*Litus* est maris, *ripa* fluminis,' says Vinnius in his Commentary on the Inst. 2. 1. 4. and he confirms this difference of extent towards the water, ibid. where he says,

'Neque verò idem est *ripa in flumine*, quod *litus in mari*. Ripa flumini non subjicitur, ut litora subjiciuntur mari, et quotidianis accessibus ab eo occupantur.'

'Nor is the bank of a river, and the shore of the sea, the same thing. The bank is not subjacent to the river, as the shores are to the sea, which are occupied by it in it's daily accesses.

In our rivers, as far as the tide flows, the beach is the actual, as well as the nominal bed of the river, during the half of every day. Above the flow of tide, it is covered half the year at a time, instead of half of every day. The tide there being annual only, or one regular tide in a year. This, in the State where I am, begins about the first of November, is at it's full tide during the months of January and February, and retires to it's mini-

† Etymologies often help us to the true meaning of words; and where they agree in several languages, they shew the common sense of mankind as to the meaning of the word. In French *Batture* is derived from *Battre*, to beat, being the margin on which the surges beat. In English *Beach*, is from the Anglo-Saxon verb Beotian, Beatian, beatian, to beat: pronounced beachian, as christian, fustian, question, are pronounced chrischian, fuschian, queschion, &c.

In Spanish *Playa*,
Italian *Piaggia*,
French *Plage*,
} are from πλαγὰ, πληγὴς.

Platin from πλάτ'λειν, percutere. Perhaps from *Plat*, F. flat.

Greek. ἀιγιαλὸς.' ἀιλὴ, from ἄγειν, agere.

Σὶν, Σινὸς, à Σένω, ferio, quia littus fluctibus feritur. Clav. Homer. A. 34.

'Ρηγμῖν, à ῥήσσω, frango. quia in litore fluctus frangitur. Ib. v. 437.

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mum by the end of April. In other States from North to South, this progression may vary a little. Hence we call them the Summer and Winter tides, as the Romans did theirs, *hibernus et æstivus*. The Missisipi resembles our fresh water rivers in having only one regular swell or tide a year. It differs from them in not being subject to occasional swells. The regions it waters are so vast that accidental rains and droughts in one part are countervailed by contrary accidents in
*46 other parts, so as never to become *sensible in the river. It is only when all the countries it occupies become subject to the general influence of summer or winter that a regular and steady flood or ebb takes place. It differs too in the seasons of it's tides, which are about three months later than in our rivers. It's swell begins with February, is at it's greatest height in May. June and July, and the waters retire by the end of August. It's high tide, therefore, is in summer, and the low water in winter. Being regular in it's tides, it is regular also in the periods of it's inundations. Whereas in ours, although the natural banks rarely escape being overflowed at some time of the season, yet the precise time varies with the accident of the fall of rains. But it is not the name of the season but the fact of the rise and fall which determines the law of the case.

Now the batture St. Mary is precisely within this band or margin, between the high and low water mark of the Missisipi, called the beach. It extended from the bank into the river from 122 to 247 yards, before Mr. Livingston began his works, and these have added in one year, from 75 to 80 feet to it's breadth. This river abounds with similar beaches, but this one alone, from it's position and importance to the city, has called for a legal investigation of it's character. Every country furnishes examples of this kind, great or small; but the most extensive are in Northern climates. The beach of the Forth, for example, adjacent to Edinburgh, is a mile wide, and is covered by every tide with 20 feet water. Abundance of examples of more extensive beaches might be produced; many doubtless from New-Hampshire and Maine, where the tide rises 40 feet. This therefore of St. Mary is not extraordinary but for the cupidity which it's importance to the city of New-Orleans has inspired.

I shall proceed to state the authorities on which this division

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between the bank and bed of the river is established, and which makes the margin or beach a part of the bed of the river.

'Ripa est pars extima alvei, quò naturaliter flumen excurrit.' Grotius de jur. B. et P. 2 8. 9.

'Ripa ea putatur esse quæ *plenissimum* flumen continet.' Dig. 43. 12. 3. And Vinnius's commentary on this passage is 'ut significet, partem ripæ non esse, spatium illud, ripæ proximum, quod aliquando flumine, caloribus minuto æstivo tempore, non occupatur.'

'Ripa autem ita rectè definietur, id quod flumen continet, naturalem* rigorem† cursus sui tenens. Cæterùm si quando vel imbribus, vel mari, vel quâ alia ratione, ad tempus excrevit, ripas non mutat. Nemo denique dixit Nilum, qui incremento suo Ægyptum operit, ripas suas mutare, vel ampliare. Nam cum ad perpetuam sui mensuram redierit, ripæ alvei ejus muniendæ sunt. Dig. 43. 12. § 5.

'Alveus flumina tegitur.' Grot. de jur. B. ac P. 2. 8. 9.

'Alveus est spatium illud flumini subjectum per quod fluit.' Vinnii Partitiones jur. Civil. 1. 17.

'The bank is the outermost part of the bed in which the river naturally flows.'

'That is considered to be bank, which contains the river when *fullest*, and Vinnius's commentary on this passage is 'this signifies that the space next to the bank, which is sometimes not occupied by the river, when reduced by heats in the summer season, is not a part of the bank.'

'The bank may be thus rightly defined, that which contains the river holding the *47 natural direction of it's course. But, if at any time, either from rains, the sea, or any other cause, it has overflowed a time, it does not change it's banks. Nobody has said that the Nile, which by it's increase, covers Ægypt, changes or enlarges it's banks. For when it has returned to it's usual height, the banks of it's bed are to be secured.'

'The bed is covered by the river.'

'The bed is the space, subjacent to the river, through which it flows.'

Littus, in the Roman law, being the beach or shore of the sea, 'rivage,' definitions of that will corroborate the division between the *ripa* and *alveus*, the *bed* and *bank* of a river. In both cases

† Rigor, à rectitudine dicitur, et est cursus aquæ rectum profluentis tenorem significans. Sic vigor stillicidii rectus ejus fluxus est. Calvini Lexicon juridicum, *rigor*. I have therefore translated it 'direction.'

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what is covered by the highest tide belongs to the public, all above it is private property.

'Litus est quousque maximus fluctus à mari pervenit. Idque Marcum Tullium aiunt, cum arbiter esset, primum constituisse.' Dig. 50. 16. 96.

'Est autem litus maris quatenùs hibernus fluctus maximus excurrit.' Inst. 2. 1. 3. the paraphrase of Theophilus adds, 'undè et æstate, usque ad ea loca litus definimus,' and his Scholiast subjoins 'non ut mediis caloribus solet, sed hibernus; quoniam hieme protissimum mare turbatur, mare est undabundum.'

'The shore is as far as the greatest wave from the sea reaches: and it is said that Marcus Tullius first established that when he was an Arbiter.'

'The shore of the sea is as far as the greatest winter wave reaches.' The paraphrase of Theophilus adds 'wherefore, in summer also, we bound the shore by the same limits,' and his Scholiast subjoins 'not the wave of midsummer, but of winter; because in winter the sea is most agitated, and most swelled.'

'By *shore*, the Institutes mean up to the high-water mark, or (where little or no tides, as in the Mediterranean) as high as the highest winter wave washes.' 1. Brown's Civil and Admiralty law. B. 2. c. 1.

We must not however, with Mr. Livingston, pa. 61. seize on the single word 'hibernus,' in the last quotations,
*48 and sacrifice *to that both the fact, and the reason of the law. The substance of the *fact* on which the law goes, is that there is a margin of the bed of the river, covered at high water, uncovered at low. The season when this happens is a matter of circumstance only, and of immaterial circumstance. In the rivers familiar to the Romans the *maximus fluctus*, or highest wave, was in the winter; in the Missisipi it is in summer. Circumstance must always yield to substance. The *object* of the law is to reserve that margin to the public. But to reduce, with Mr. Livingston, the public right to the Summer water-line would relinquish that object. The explanations quoted from Vinnius, from Theophilus and his Scholiast, prove from the reason of the law, that the law of the winter tide for the Po, and the Tyber, must be that of the Summer tide for the Missisipi. The Spanish law therefore, is expressed in more correct terms;

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and we have the authority of Mr. Livingston [ibidem] for saying that the Justinian code is the common law of Spain.

'La ribera del rio se entiende todo lo que cubre el agua de el, quando mas crece, en qualquiera tiempo del año, sin salir de su yema y madre.' Curia Philipica. 2. 3. 1. cited Derb. 46.

'The bank of a river is understood to be the whole of what contains it's waters, when most swelled, in whatsoever time of the year, without leaving it's bed or channel.'

This is the law correctly for all rivers, leaving to every one it's own season of flood or ebb.

To these authorities from the Roman and Spanish law, I will add that of the French Ordinance of 1681. § 43. Art. 1. on the same subject.

'Sera réputé bord et rivage de la mer, tout ce qu'elle couvre et découvre [precisely the beach or batture] pendant les nouvelles et pleines lunes, et jusqu'où le grand flot de mer cesse de s'y faire sentir. Il est facile de connoître jusqu'où s'étend ordinairement le grand flot de Mars, par le gravier qui y est déposé; ainsi il ne faut pas confondre cette partie avec l'espace où parvient quelque fois l'eau de la mer par les ouragans, et par les tempêtes. Ainsi jugé à Aix le 11. Mai 1742.' Boucher, Institut au droit Maritime 2713. Nouveau Commentaire sur l'Ordonnance de la Marine. de 1681. tit. 7. Art. 1.

'The border and shore of the sea shall be reputed to be the whole which it covers and uncovers [precisely the beach or batture] during the new and full moons, and as far as to where the full tide of the sea ceases to be perceived. It is easy to know how far ordinarily the full tide of March extends; by the gravel which is deposited there; therefore we must not confound that part with the space where the waters of the sea come sometimes, in hurricanes and storms.' So adjudged at Aix, May 11, 1742.

Let us now embody those authorities, by bringing together the separate members, making them paraphrase one another, and form a *single description. The Digest 43. 12. 3. with Vinnius's comment will stand thus. 'The bank ends at the line to which the water rises at it's full tide; *49

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and although the space next below it is sometimes uncovered by the river, when reduced by heats in the Summer season, yet that space is not a part of the bank.' Now, substituting for 'the heats of the summer season' which is circumstance, and immaterial, the term 'low water,' which is the substance of the case, nothing can more perfectly describe the beach or batture, nor, collated with the other authorities, make a more consistent and rational provision. 'The bank ends at that line on the levée to which the river rises at it's full tide: and altho' the batture or beach next below that line is uncovered by the river, when reduced to it's low tide, yet that batture or beach does not therefore become a part of the bank, but remains a part of the bed of the river,' for says Theophilus 'even in low water [et æstate] we bound the bank at the line of high water. Inst. 2. 1. 3. 'The bank being the *extima alvei*, the *border of the bed*, within which bed the river flows when in it's fullest state *naturally*, that is to say, not when 'imbribus, vel quâ aliâ ratione, ad tempus, excrevit,' not when 'temporarily overflowed by extraordinary rains &c.' Dig. 43. 12. 5. but 'quando mas crece, sin salir de su madre, en qualquiera tiempo del año,' 'when in it's full height, without leaving it's bed, to whatsoever season of the year the period of full height may belong.' This is unquestionably the meaning of all the authorities taken together, and explaining one another.

From these authorities, then, the conclusion is most rigorously exact, that all is river, or river's *bed*, which is contained between the two banks, and the high water line on them; and all is *bank* which embraces the waters in their ordinary full tide.

Agreeably to this has been the constant practice and extent of grants of lands on the Missisipi. Charles Trudeau swears [Liv. 57.] that 'during 28 years that he has performed the functions of Surveyor General of this province, it has always been in his *knolege*, that the grants of lands on the borders of the Missisipi, have their fronts on the *edge* of the river itself, and when it's waters are *at their greatest height*.' And Laveau Trudeau [Liv. 58.] that 'the concession to the Jesuits, he believes, was like all the others, that is, from the river at it's greatest height.'

Thus we see what the law is; that it has been perfectly understood in the territory, and has been constantly practised on,

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and consequently that neither the grant to the Jesuits, nor to Bertand Gravier, could have included the beach or batture.

It will perhaps be objected that, establishing the commencement of the bank at the high water mark, leaves in fact no bank at all, as the high water regularly overflows the natural* bank, or brim of the channel. And will it be a new phænomenon to see a river without banks sufficient to contain it's waters at their full tide? The Missisipi is certainly a river of a character marked by strong features. It will be very practicable, by exaggerating these, to draw a line of separation between this and the mass of the rivers of our country, to consider it as *sui generis*, not subject to the laws which govern other rivers, but needing a system of law for itself. And until this system can be prepared it may be abandoned to speculations of death and devastation like the present. But will this be the object of the sound judge or legislator? it is certainly for the good of the whole nation to assimilate as much as possible all it's parts, to strengthen their analogies, obliterate the traits of difference, and to deal law and justice to all by the same rule and same measure. The *bayous* of all that territory and of the country thence to Florida Point are without banks to contain their full tides. The Missisipi is in the like state as far as Baton Rouge, where competent banks first rise ou of the waters, and continue with intervals of depression to it's upper parts. Many of the rivers of our maritime states are under circumstances resembling these. The channel which nature has hollowed for them is not yet deep enough, or the depositions of earth on the adjacent grounds not yet sufficiently accumulated, to raise them entirely clear of the flood tides. Extensive bodies of lands, still marshy therefore, are covered by them at every tide. In some of these cases, the hand of man, regulated by laws which restrain obstructions to navigation and injury to others, has aided and expedited the operations of nature, by raising the bank which she had begun, and redeeming the lands from the dominion of the waters. The same thing has been done on the Missisipi. An artificial bank of 3, 4, or 5 feet has been raised on the natural one, has made that sufficient to contain it's full waters, and to protect a fertile and extensive country from it's ravages. These are become the real banks of the

Missisipi.

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Nile. river, on which the laws operate as if the whole was natural. The Nile, like the Missisipi, has natural banks, not competent in every part to the conveyance of it's waters. In these parts artificial banks are, in like manner, raised, through which and the natural bayous and artificial canals the inundation, when at a given† height, is admitted; this being indispensable to fertilise the lands in a country where it never rains. And these banks of the Nile, natural and artificial, are recognised as such by the Roman law, as appears in *51 *a passage of the Digest before cited, declaring that it's banks, tho' inundated periodically, are not thereby changed. Nor are those of our rivers when temporarily overflowed by rains, or other causes. Wherever therefore the banks of the Missisipi have no high water line, the objection is of no consequence, because the lands there are not as yet reclaimed or inhabited; and wherever they are reclaimed, the objection is not true; for there a high water line exists to separate the private from public right.‡

† Justum incrementum [Nili] est cubitorum XVI; in XII. cubitis famem sentit: in XIII etiamnum esurit: XIV cubita hilaritatem afferunt: XV securitatem: XVI. delicias: maximum incrementum, ad hoc ævi, fuit cubitorum XVIII. cum stetêre aquæ, apertis molibus admittuntur. Plin. hist. nat. 5. 9.

‡ This part of our subject merits fuller development. That the periodical overflowings of some rivers do not differ from the accidental overflowings of others, in any circumstance which should affect the law of the high water line, in the one more than in the other, will be rendered more evident by taking a comparative view of them. To begin with ordinary rivers. 1. These have along their greater part, and some of them through their whole course, natural banks adequate to the confinement of their waters, in the high water season, except in cases of accidental inundation. Here, then, the Roman authorities tell us the inundation does not change the bank, nor the landmark on it. 2. Along other parts, where the natural bank was not high enough to contain the river in it's season of steady high water, the hand of man has raised an artificial bank on the natural one, which effects this purpose, with the exception, as before, of accidental inundations, where such happen This artificial bank performs all the functions of the natural, and is placed under the same law. 3. In other parts of them, the natural banks are still not high enough to contain the high tides, nor have they yet been made so by the hand of man. Here then the law cannot operate, because the local peculiarities, as yet, exclude the case from it's provisions. The ground so covered by inundation, has been, or may yet be, public property. But the legislator, instead of holding it as the bed of the river, grants it to individuals, as far as to the natural, or incipient bank, that they, by completing the bank, may reclaim the land, for their own and

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*Having ascertained what the batture is not, and what it is, and established the high water mark as the line of partition between the bed and bank of the river, we will proceed to examine to whom belongs the ground on either side of that line? *52. Property in bed & bank.

the public benefit, and, this done, the law comes into action on it. Much of this reclaimed, and unreclaimed land exists in all these states.

I proceed next to rivers of particular character. Of which among those analogous to the Missisipi, the Nile is best known to us, and shall be described. That river entering Upper Egypt at it's Cataracts, flows through a valley of 20 or 30 miles wide, and of 450 miles in length, bounded on both sides by a continued ridge of mountains. Through most of this course, it's natural banks are sufficient to contain it's waters in time of flood, till they rise to that height, at which, by their law, they are to be drawn off. In low parts where the natural banks are not sufficient, they have been raised by hand to the necessary height. In addition also to the natural *bayous*, like those of the Missisipi, they have opened numerous canals, leading off at right angles from the river towards the mountains, and sufficient to draw off the greatest part of the current passing down the river. These, in ordinary times, are closed by artificial banks raised to the level of the natural ones. When the flood is at a height sufficient for irrigating and fertilising the fields, which by the Nilometer is at 16 cubits above the bed of the river, these artificial banks are cut, and the waters let in. The plain declining gently from the banks of the river, (which, like those of the Missisipi, are the highest ground,) towards the mountains, the waters are there stopped, as by a dam, and continue to rise, and diffuse themselves till they reflow nearly to the bank of the river. If the rise ceases there, the waters remain stagnant, and deposit a fertilising mud, over the whole surface. But if uncommon rains above occasion a continuance of the rise till all the waters meet over the summits of the banks, then the motion of that in the river is communicated to the stagnant water on the plains, a general current takes place, and instead of a depositum left, the former soil is swept away to the ocean, and famine ensues that year. This, the traveller Bruce informs us, had happened three times within the 30 years preceding his being in that country. When the waters have withdrawn, and the river is returned into it's natural bed, the banks are repaired in readiness to restrain the floods of the ensuing year. Such is the case in Upper Egypt. When the river enters Lower Egypt, it parts into two principal branches, the Pelusian and Canopic, which diverge and reach the Mediterranean at about 200 miles apart, including between them the triangle called the Delta. Besides these, there are, within the Delta, three natural *Bayous*, and two canals, dry at low water, which make up the famed seven mouths of the Nile. The mountains diverge as do the main branches of the river, the Eastern going off to the isthmus of Suez, and the Western to the sea near Alexandria. The waters lessened by depletion, and spreading over a widening plain are reduced, by the time they reach the base of the triangle at the sea, to one or two cubits depth. Banks, therefore, of 3 or 4 feet high, are sufficient to protect the country until here also they open the *bayous* and canals which intersect the triangle. Here then the case recurs of a river whose natural banks are

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And 1. As to the bed of the river, there can be no question but that it belongs purely and simply to the sovereign, as the representative and trustee of the nation. If a navigable river indeed deserts it's bed, the Roman law gave it to the adja-
53 cent proprietors; the former law of France to the sovereign; and the new Code gives it as an indemnity to those through whose lands the new course is opened. But, while it is occupied by the river, all laws, I believe, agree in giving it

partly competent to contain it's high waters in common floods, and are partly made so by the hand of man; so as to funish an ordinary high water line. In extraordinary floods it overflows these banks, and in ordinary ones is let through them. Yet these inundations, as the Digest declares, do not change the banks. 'Nemo dixit Nilum ripas suas mutare,' &c. But when the river retires within it's natural bed, the banks are again repaired: 'cum ad perpetuam sui mensuram redierit, ripæ alvei ejus muniendæ sunt,' ib. [See 2. Herodot. 6—19. Strabo 788. 1 Univ. Hist 391—413. 1 Maillet Description de l'Egypte 14—121. 1. De la Croix 338. Encyclop. Meth Geographie. Nil. 1. Savary 3—14. 2. Savary 185—275. 1. Volney 34—48. 4. Bruce 364—407.]

1. The Upper Missisipi, like the Upper Nile, has competent natural banks through probably three fourths of it's whole course. There then the Roman law is applicable in it's very letter. 2. For about 400 miles more, the natural banks have been aided by artificial ones, on both sides, so as to contain all the waters of the flumen plenissimum: and the inhabitants there have no occasion, as those of the Nile, to open their banks for the purpose either of fertilising, or irrigating the lands. Here then there is still less reason, than in the case of the Nile, to say that 'the Missisipi has changed it's bank.' 3. On the lower parts of the Missisipi, and some of it's middle portion, especially on the Western side, artificial banks have not yet been made, and the country is regularly inundated, as it is on those parts of our Atlantic rivers not yet embanked But our increasing population will continue to extend these banks of our Atlantic rivers; and, for this purpose, our governments grant the lands to individuals. And the same, we know, is done on the Missisipi. The *Cyprieres* adjacent to New-Orleans, for example, though covered with the refluent water from the lake, we know have been granted to individuals, and will, with the rest of the drowned lands, be reclaimed in time, as all Lower Egypt has been.

Thus then we find the laws of the Tyber and Nile transferred and applied to the Missisipi with perfect accordance, and that all rivers may be governed by the same laws. Other rivers are subject to accidental floods, which are declared however not to disturb the law of the *plenissimum flumen*. The Nile and Missisipi, not being subject to accidental floods, the *flumen plenissimum* with them, is steady and undisturbed, and needs not the benefit of the exception. Nor will the reason of the law be changed, whether the cause of the inundation be the saturation of the earth and fountains, or rains, or melted snows, or the reflux of the ocean. The principle remains universally the same, that the land mark, when once established by a competent bank, is not changed by inundation, or by any cause or circumstance of it's high waters.

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to the sovereign; not as his personal property, to become an object of revenue, or of alienation, but to be kept open for the free use of all the individuals of the nation.

'Flumina omnia, et portus, publica sunt.' Inst. 2. 1. 2.

'All rivers and ports are public.'

'Impossibile est ut alveus fluminis publici non sit publicus.' Dig. 43. 12. 7.

'It is impossible that the bed of a public river should not be public.'

'Litus publicum est eatenùs qua maximus fluctus exæstuat. Dig. 50. 16. 96. 112.

'The seashore is public as far as the greatest wave surges.'

And 'littus' we have seen is the beach or shore of the sea.

'As to navigable streams and rivers, on which boats can ply, the property of them is in the king, as an incontestable right, naturally attached to the sovereignty; and since public things belonged to the people in the Roman republic, amongst us [in France] they must belong to our Sovereigns.' Julien, cited by Thierry 10. And Prevost de la Jannès, in his Principles of French Jurisprudence, after having said that the property of public things belongs to the king adds 'subject to the use thereof that is due to the people.' Thierry, ib.

In like manner, by the Common law of England, the property, *tam aquæ quam soli*, of every river, having flux or reflux, or susceptible of any navigation, is in the king; who cannot grant it to a subject, because it is a highway, except for purposes which will increase the convenience of navigation. 'The king has a right of property to the sea shore, and the *maritima incrementa*. The *shore* is the land lying between high water and low-water mark in ordinary tides, and this land belongeth to the king *de jure communi*, both in the shore of the sea, and the shore of the arms of the sea. And that is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows.' Hale de jure maris. c. 4. cited in Bac. Abr. Prærog. B. 3.

So that I presume no question is to be made but that the bed of the Missisipi belongs to the sovereign, that is, to the Nation.

2. In the bank, from the high water line inland, it is admitted that the property or ownership, is in the Riparian proprie-

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tor of the adjacent field or farm: but the use is in the public, for the purposes of navigation and other necessary uses.

'Riparum quoque usus publicus est jure gentium [i. e. gentis humanæ] sicut ipsius fluminis: itaque naves ad eas appel-
*54 lere, funes arboribus ibi natis religare, onus aliquod in his reponere, cuilibet liberum est, sicutper ipsum flumen navigare. Sed proprietas earum, illorum est, quorum prædiis hærent: quâ de causâ arbores quoque in eisdem natæ eorundem sunt.' Inst. 2. 1. 4. And Vinnius adds 'non ut litora maris, ita ripas, conditionem fluminis sequi.'

'Publica sunt flumina, portus, alveus fluminis quamdiu à flumine occupatus, ripæ. Harum rerum omnium, proprietas nullius, si ripas exciperis, quarum proprietas eorum est qui propè ripam prædia possidunt.' Vinnii Part. jur. L. 1. c. 17.

'The use of the banks is public by the law of nations [i. e. of nature] as to navigate the river itself. Therefore it is free for every *one to bring his ships to at them, to make fast ropes to the trees growing there, to discharge any load on them. But the property of them is in those to whose farms they adhere; for which reason the trees likewise growing on them, belong to the same.' And Vinnius adds 'the banks do not, like the shores of the sea, follow the condition of the river.'

'Rivers, harbours, the beds of rivers as long as occupied by the river, and the banks are public. The property of all these is in no one, if you will except the banks, the property of which is in those who possess the farms on the bank.'

'Rivers, streams, high roads belong to all men in common; and although the soil of the banks of the rivers be an accession to the property of the owners of the contiguous land, yet all men may make use of them so far as to make fast their vessels to the trees which grow there, to repair them, and spread their sails on the banks; and they may there discharge their goods. Fishermen have also a right to dry their nets there, to expose their fish for sale on the banks, and in general to use them for every purpose of their art, or the occupation by which they live.' 3 Part id. 28. 6. ci ed Thierry 9.

'The same usefulness of the navigation of rivers demands the free use of their banks, so that in the breadth and length necessary for the passage and track of the horses which draw the boats there be neither tree planted nor any other obstacle

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in the way.' Domat, Pub. law. 1. 8. 2. 9. To moor their vessels, spread their sails, unlade, sell their fish, &c. are here mentioned for example only, and not as a full enumeration of the variety of uses which, flowing from the public rights, may be exercised by them. In England it is said to have been decided that the public have no *common-law* right to tow upon the banks of navigable rivers. 3 Term. Rep. 253. cited Bac. Abr. highways A.

These authorities are so clear that they need no explanation. The text is as plain as any commentary can make it.

Limitations of the rights of property.

But there is an important limitation to these rights. Every individual is so to use them as not to obstruct others in their equal enjoyment. The space every one occupies on the bank or bed, as in a highway, a market, a theatre, is his for reasonable temporary purposes, but not to be held *permanently. The adjacent landholder may repair or fortify his bank to protect his land from inundation, but, under the control of the magistrate, that his neighbours be not injured. He cannot divert the course of the stream, or even draw off water from it, to the injury of the navigation; nor erect any work which shall incommode the harbour or quai. *55

'Ne quid in flumine publico, ripâve ejus, facias, ne quid in flumine publico, neve in ripa ejus immittas, quo statio, iterve navigio deterior sit. Dig. L. 43. t. 12. l. 1. Stationem dicimus a statuendo: is igitur locus demonstratur, ubicunque naves tutò stare posunt. ib. §. 13.

'Deterior statio, itemque iter navigio fieri videtur, si usus ejus corrumpatur, vel difficilior fiat, aut minor, vel rarior, aut si in totum auferatur. Proinde, sive derivatur aqua, ut exiguior facta minus sit navigabilis, vel si dilatetur, aut diffusa, brevem aquam faciat: vel contra sic coangustetur, et rapidius flumen faciat: vel si quid aliud fiat, quod navigationem

'You are not to do any thing in a public river, or on its banks, you are not to cast any thing into a public river, or on its banks, which may render the station, or course of a ship worse. It is called a *station*, from statuere, to place: that place is intended where ships may safely stay.

'The station and course of a ship seems to be rendered worse, if it's use be destroyed, or made more difficult, or less, or scantier, or if it be wholly taken away. Moreover, if water be drawn off, so that, being scantier, it is less navigable, or if it be dilated, or spread out, so as to make the water shallow, or if on the other hand it be so narrowed as to make

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incommodet, difficiliorem faciat, vel prorsus impediat, interdicto locus erit.' Dig. 43. 12. 15.

'Molino, nin canal, nin casa, nin torre, nin cabaña, nin otro edificio ninguno, non puede ninguno home facer nuevamente en los rios por los quales los omes andan con sus navios, nin en las riveras dellos, porque se embarrasse el uso comun dellos. E si alguno lo ficiesse y de nuevo, ó fuesse fecho antiguamente, de que viniesse daño al uso comunal, *debe ser deribado*. Ca non seria cosa guisada que el pro de todos los omes comunalmente se estorbasse por la pro de algunos.' Partidas. 3. 28. 8. cited Derb. 48. Poydras 12.

the river more rapid; or if any thing else be done which incommodes the navigation, makes it worse, or wholly impedes it, there is ground for Interdict.'

'Mill, nor canal, nor house, nor tower, nor cabin, nor other building whatsoever, may any man make newly in the rivers along which men go with their vessels, nor on their banks, by which their common use may be embarrassed. And if any one does it anew, or were it antiently done, so that injury is done to the common use, it ought *to be destroyed*. For it would not be meet that the benefit of all men in common should be disturbed for the benefit of some.'

The owner of lands on the bank of a river may, however, make or repair a bank to protect them from the river.

*56 *'Quamvis fluminis naturalem cursum, opere manu facto alio, non liceat avertere, tamen ripam suam, adversus rapidi amnis impetum, munire prohibitum, non est.' Codex L. 7. t. 41. § 1.

'Although it is not allowed to turn the natural course of a river by another made by hand, yet it is not prohibited to guard one's bank against the force of a rapid river.'

But he is not permitted to do even this if it will affect the public right, or injure the neighbouring inhabitants.

'In flumine publico, inve ripâ ejus facere, aut in id flumen ripamve immittere, quo *aliter* aqua fluat quam priore æstate fluxit, veto. Dig. L. 43. tit. 13. § 1.

'I forbid any thing to be done in a public river, or on it's bank, or to be cast into the river or on it's bank, by which the water may be made to flow otherwise than it flowed in the last season.'

'Quod autem ait, *aliter* fluat non ad quantitatem aquæ fluentis pertinet, sed ad modum, et ad

'When he says, *to flow otherwise*, it relates, not to the quantity of water, but to the manner

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rigorem cursûs aquæ referendum est. Et si quod aliud vitii accolæ ex facto ejus qui convenitur sentient, interdicto locus erit. Ib. §. 3.

'Sunt qui putent excipiendum hoc interdicto "quod ejus ripæ muniendæ causa non fiet," scilicet ut si quid fiat quo aliter aqua fluat, si tamen muniendæ ripæ causâ fiat, interdicto locus non sit. Sed ne hoc quibusdam placet; neque enim ripæ, cum incommodo accolentium, muniendæ sunt.' Ib. §. 6.

and direction of the course of the water. And if the neighbours experience any other evil from the act of him who is convened, there will be ground for interdict.'

'Some think liable to this interdict only "what is not done for the purpose of strengthening the bank," to wit, that if any thing be done by which the water may otherwise flow, if nevertheless it was to secure the bank there is no ground for interdict. But this is not approved by others, for that banks are not to be secured to the inconvenience of the inhabitants.'

More particularly full and explicit as to the inhibitions of the law against obstructing the bed, beach or bank of a sea or river, is Noodt, Probabil. Juris civilis. 4. 1. 1. After declaring that as to a house, or other such thing, built in a public river, the law is the same as obtains as to the sea and sea shore, he proposes to state, 1. The law respecting the sea and it's shore, and 2. As it respects a river and it's bank; and says,

'Ait Celsus maris communem usum esse, ut aëris; jactasque in id pilas fieri ejus qui jecit: sed id concedendum non esse, si deterior litoris marisve usus eo modo futurus sit. Adeo hoc quod in mari exstructum est, facientis est. Ut tamen exstruere liceat, et *decreto opus est*, et *ut innoxia ædificatio sit*. Porrò ut usus maris, ita usus litoris, sive communis, sive publicus est jure gentium; et ideò licet unicuique in litore ædificare, litusque ædificatione suum facere. Si tamen, ut in mari, ita in litore, *impetravit*: præterea si non eo modo deterior

'Celsus says that the use of the sea is common, as is that of the air: and that stones laid in it were his who laid them, but that it was not to be admitted if the use of the shore or sea would be *the worse. So *57
what is constructed in the sea, is his who constructs it. But to make it lawful to construct, a decree is necessary, and that the construction be innocent. Moreover, as the use of the sea, so that of the shore, is either common, or public, by the law of nations. And therefore it is lawful for any one to build on the shore, and to

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futurus sit usus litoris; vel nisi usus publicus *impediet*. Hoc in mari et litoribus jus est. Idem in fluminibus publicis, Ulpiano teste, Dig. 39. 2. 24. cum sic ait, 'fluminium publicorum communis est usus, sicut viarum publicarum et litorum. In his igitur *publicè* licet cuilibet ædificare, et distruere, dum tamen hoc sine incommodo cujusquam fiat.' Vult tamen Ulpianus, ut ædificari possit, ædificari *publicè* et *sine cujusquam incommodo;* pariter ut in mari et litore definitum: *publicè* inquam, seu *publicâ auctoritate;* id enim hoc verbum, *publicè*, indigitat.' And (§. 2.) citing Dig. 43. 12. 4. he says, 'quæsitum est, an is, qui in utrâque ripâ fluminis publici domus habeat, pontem privati juris [vel privato jure] facere potest; respondit non posse.' Et si facit, interdicto teneri. Causa responsi est quod, cum pontem facit, usum fluminis publici facit deteriorem.' So far Noodt.

make the shore his by the building; if however, as in the sea, so on the shore, he has obtained permission: and provided besides, the use of the shore will not thereby be rendered worse, nor the public use be impeded. This is the law as to the sea and it's shores. It is the same as to public rivers, according to Ulpian. Dig. 39. 2. 24. where he says, 'the use of public rivers is common, as of highways and shores. In these, therefore, any one may build up, or pull down, *publicly*, provided it be done without *inconvenience to any one.*' That you may build, however, Ulpian requires that you build *publicly*, and *without inconvenience* to any one; in like manner as is prescribed as to the sea, and it's shore: *publicly*, I say, or *by public authority:* for that is what the word, *publicly*, indicates. And §. 2. citing Dig. 43. 12. 4. he says, 'it is asked whether he who has houses on both banks of a public river, may build a bridge, of his own private authority. He answers, he cannot not? and if he does, he is bound by the interdict. The reason of the answer is, that by building a bridge he injures the use of a public river.' So far Noodt.

*58 *The same is the law as to highways and public places. Dig. 43. 8. 2. 16.

'Si quis à principe simpliciter impetraverit ut in publico loco ædificet, non est credendus sic ædificare ut cum incommodo alicujus id fiat.'

'If any one obtains leave, simply, from the prince, to build in a public place, it is not to be understood he is so to build as to incommode another.'

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We see then that the Roman law not only forbade every species of construction or work on the bed, beach or bank of a sea or river, without regular permission from the proper officer, but even annuls the permission after it is given, if, in event, the work proves injurious; not abandoning the lives and properties of it's citizens to the ignorance, the facility, or the corruption, of any officer. Indeed, without all this appeal to such learned authorities, does not common sense, the foundation of all authorities, of the laws themselves, and of their construction, declare it impossible that Mr. Livingston, a single individual, should have a lawful right to drown the city of New-Orleans, or to injure, or change, of his own authority, the course or current of a river which is to give outlet to the productions of two thirds of the whole area of the United States?

Such, then, are the laws of Louisiana, declaratory of the public rights in navigable rivers, their beds and banks. For we must ever bear in mind that the Roman law, from which these extracts are made, so far as it is not controlled by the Customs of Paris, the Ordinances of France, or the Spanish regulations, is the law of Louisiana. Nor does this law deal in precept only, or trust the public rights to the dead letter of law merely: it provides also for enforcement. The Digest, L. 43. tit. 15. de ripâ muniendâ, provides

§. 1. 'Ripas fluminum publicorum reficere, munire, utilissimum est,—*dùm ne ob id navigatio deterior fiat:* illa enim sola refectio toleranda est, quæ navigationi non est impedimento.'

§. 1. 'To repair and strengthen the banks of public rivers, is most useful: provided the navigation be not by that deteriorated; for those repairs alone are to be permitted which do not impede the navigation.'

§. 3. 'Is autem qui ripam vult munire, de damno futuro debet vel cavere, vel satisdare, secundum qualitatem personæ. Et hoc interdicto expressum est, ut damni infecti, in annos decem, viri boni arbitratu, vel caveatur, vel satisdetur.'

§. 3. 'But he who would strengthen his bank, should give either an engagement, or security against future injury, according to the quality of the person. And this interdict establishes that the engagement, or security, against future injury, shall be for ten years, by the opinion of a good man.'

Surety.

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§. 4. 'Dabitur autem satis vicinis; sed et his qui trans flumen possidebunt.'

'Ne quid in loco publico facias, inve eum locum immittas, quâ ex re quid illi damni detur. Dig. 43. 8. 2. Ad ea loca hoc interdictum pertinet, quæ publico usui destinata sunt: ut si quid illic fiat, quod privato noceret, Prætor intercederet interdicto suo. §. 5.—Adversus eum qui molem in mare projecit, interdictum utile competit ei, cui forte hæc res nocitura sit: si autem nemo damnum sentit, tuendus est is, qui in litore ædificat, vel molem in mare jacit. §. 8. —Damnum autem pati videtur, qui commodum amittit, quod ex publico consequebatur, qualequale sit. §. 11.—Si tamen nullum opus factum fuerit, officio judicis continetur, ut caveatur non fieri.' §. 18.

§. 4. 'Security shall be given to the neighbours, and also to possessors on the other side of the river.'

'You are to do nothing in any public place, nor to cast any thing into that place, from which any damage may follow. This interdict respects those places, which are destined to public use: and that if any thing be there done, which may injure an individual, the Prætor may interpose by his interdict.—Against him who projects a mole into the sea, the *interdictum utile* lies for him to whom this may possibly do injury, but if nobody sustains damage, he is to be protected who builds on the sea shore, or projects a mole into the sea. —And he seems to suffer injury who loses any convenience, which he derived from the public, whatsoever it may be.—But if no work is done, he should be constrained by the authority of the judge to engage that none shall be done.'

'Seeing the use of rivers belongs to the public, nobody can make any change in them that may be of prejudice to the said use. Thus one cannot do any thing to make the current of the water slower, or more rapid, should this change be any way prejudicial to the public, or to particular persons. Thus although one may divert the water of a brook, or a river, to water his meadows, or other grounds, or for mills and other uses; yet, every one ought to use this liberty so as not to do any prejudice either to the navigation of the river, whose waters he should turn aside, or the navigation of another river which the said water should render navigable by discharging itself into it, or to any other public use, or to neighbours who should have a like want, and an equal right.' Dom. Pub. law. 1. 8. 2. 11.

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*The same laws make it peculiarly incumbent on the government and it's officers to watch over the public property and rights, and to see that they are not injured or intruded on by private individuals. *60 'In order to preserve the navigation of rivers, it is proper for the government to prohibit and punish all attempts which might hinder it, or render it inconvenient, whether it be by any buildings, fisheries, stakes, floodgates and other hindrances, or by diverting the water from the course of the rivers, or otherwise. And it is likewise forbidden to throw into the rivers any filth, dirt and other things, which might be of prejudice to the navigation, or cause other inconveniences.' Dom. Pub. L. 1. 8. 2. 8.

'Quoique la mer et ses bords soient, suivant les principes du droit naturel, des choses publiques et communes à tous, avec faculté à chacun d'en user selon sa destination, neanmoins il ne doit pas être permis aux uns d'en jouir au préjudice des autres. Ainsi pour prévenir les inconveniens qui seroient résultés de la liberté d'user de la chose commune, il a fallu que cette liberté fut limitée par la puissance publique, ainsi que s'en explique Domat, &c. Nouv. Comment. sur l'ordon. de 1681. tit. 7. art. 2. Note.

'Although the sea and it's shores, according to the principles of natural law, are things public and common to all, with liberty to every one to use them according to their destination, nevertheless it ought not to be permitted to some to enjoy them to the prejudice of others. Therefore to prevent the inconveniences which would result from the liberty of using the public property, it is necessary that that liberty be limited by the public authority, as explained by Domat,' &c.

'It is likewise agreeable to the law of nature, that this liberty, which is common to all, being a continual occasion of quarrels, and of many bad consequences, should be regulated in some manner or other; and there could be no regulation more equitable, nor more natural, than leaving it to the sovereign to provide against the said inconveniences. For as he is charged with the care of the public peace and tranquillity, as it is to him the care of the order and government of the society belongs, and it is only in his person that the right to the things which may belong in common to the public, of which he is the head, can reside; he therefore as head of the commonwealth, ought

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to have the dispensation and exercise of this right, that he may render it useful to the public. And it is on this foundation that the Ordinances in France have regulated the use of navigation, and of fishing, in the sea and in rivers.' Dom. P. L. 1. 8. 2. 1. note. Observe that the work of Domat was published *61 in 1689, and he died in 1696. *Dict. hist. par une société. *verbo* Domat. We know then from him the state of the laws of France, at a period a little anterior only to the establishment of the colony of Louisiana, and the transfer of the laws of France to that colony by it's charter of 1712.

To the provisions which have been thus made by the Roman and French laws and transferred to Louisiana, no particular additions, by either the French or Spanish government, have been produced on the present occasion. We know the fact, and thence infer the law, that from a very early period, the governors of that province were attentive especially to whatever respected the harbour of New Orleans, which included the grounds now in question. We see them forbidding inclosures, or buildings on them, pulling down those built, publishing bans against future erections, forbidding earth for buildings and streets to be taken from the shore adjacent to the city, and assigning the beach Ste. Marie for that purpose, protecting all individuals in the equal use of it as a Quai, in which cares and superintendance the Cabildo, or City Council, participated; and on the change of government we see that council pass an Ordinance declaratory of the limits of the port of N. Orleans, and come forward in defence of the public rights, in the first moment of J. Gravier's intrusion, by pulling down his inclosure; and when that intrusion under the enterprise of Mr. Livingston, assumed a more serious aspect, they, as municipal guardians of the interests of the city, made an immediate appeal to the Judiciary, the Executive and Legislative authorities. In addition, too, to the French laws for the protection of the bed and bank of the river, the territorial legislature, on the 15th of Feb. 1808, passed an Act, reciting that inasmuch as 'the common safety of the inhabitants of the shores of the river Missisipi depends not only on the good condition of the levées or embankments, which contain the waters of the said river; but also on the strict observance of the laws concerning the police of rivers and their banks, *which are in force in this*

Levees and Police of Missisipi.

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territory, and by which it is forbidden to make on the shores of the rivers, any work tending to alter the course of the waters, or increase their rapidity, or to make their navigation less convenient, or the anchorage less sure, [almost in the words of the Roman law 'ne quid in flumine publico'] they therefore enact that no levée shall be made in front of those which exist at present, but on an inquisition by 12 inhabitants, proprietors of plantations situate on the banks of the river, convoked for that purpose, by the Parish judge; that no such levée, which at the time of passing this act shall happen to be commenced in front of others already existing, shall be continued or finished, without a like authorisation;* that those who act in con- *62
travention shall be fined 100 dols. for every offence in contravention, and pay the expenses of removing the nuisance, and costs of suit; and prohibiting the receiving compensation for the use of the shores under a penalty of 500 dols. A law of wonderful, not to say imprudent and dangerous tenderness to the riparian proprietors, who are thus made the sole judges in cases where their own personal interests may be in direct opposition to the interests, and even the safety of the city, to which it gives no participation or control over the power which may devote it to destruction.

This act is partly declaratory of the existing law, and partly additional. Application was to the Prætor under the Roman law (Dig. 43. 13. 6.) for permission to fortify a bank for the protection of a farm. He might refuse permission if injurious; but if he thought it would not be injurious, the party was to give security to make good all damages which should accrue within ten years; and this security was for the protection, not only of immediate neighbours, but of those also on the opposite bank 'trans flumen possidentibus.' The Governor and Cabildo seem to have held this Prætorian power in Louisiana, as well as that of demolishing what was unlawfully erected. This act of the Legislature, without taking the power from the Governor and City Council, gives a concurrent power to the parish judge, and a jury of 12 riparians: and without dispensing with the security required by the existing law, adds penalties against contraveners.

And surely it is the territorial legislature, which not only has the power, but is under the urgent duty, of providing regula-

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tions for the government of this river and it's inhabitants, regulations adapted to their present political relations, as well as to the peculiar character and circumstances of the river, and the adjacent country. Their power is amply given in the act of Congress of 1804. c. 38. § 11. 'The laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature. § 4. The Governor, by and with advice and consent of the said legislative council, or of a majority of them, shall have power to alter, modify, and repeal the laws which may be in force at the commencement of this act. Their legislative powers shall extend to all the rightful subjects of legislation;' with special exceptions, none of which take away the authority to legislate for the police of the river. And if ever there was a rightful subject of legislation, it is that of restraining greedy individuals from destroying the country by inundation.

Suspension of Liv.'s works, by whom?

And here it must be noted that Mr. Livingston's works were arrested by the Marshal and posse comitatus, by an order from the Secretary of State on the *25th of January 1808, and on the 15th of the ensuing month, the legislature took the business into the hands of their own government, by passing this act. From this moment it was in Mr. Livingston's power to resume his works, by obtaining permission from the legal authority. The suspension of his works therefore by the general government was only during these 21 days.

*63

Their nature.

That Mr. Livingston's works were clearly within the interdict of the Roman, the French and the Spanish laws, which forbid the extending a mole into the water, constructing in it mills, floodgates, canals, towers, houses, cabins, fisheries, stakes or other things which may obstruct or embarrass the use, will result from a brief recapitulation of their character and effects, drawn from the statement before given: For it is not to establish a mill, which, though an intrusion, would be but a partial one: it is not to erect a temporary cabin or fisherman's hut, which would be a minor obstacle: but it is to take from the city and the nation what is their port in high water, and at low tide their Quai; to leave them not a spot where the upper craft can land or lie in safety; to turn the cur-

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rent of the river on the lower suburbs and plantations; to embank the whole of this extensive beach; to take off a fourth from the breadth of the river, and add equivalently to the rise of it's waters; to demolish thus the whole levée, and sweep away the town and country in undistinguished ruin. And this not as a matter of theory alone, but of experience: the fact being known that since the embankment of the river on both sides through a space of three or four hundred miles the floods are two or three feet higher than before that embankment. In fine, should they have time to save themselves from inundation, by doubling the height and breadth of their levée, it is that they may fall victims to the pestilential diseases which, under their fervid sun, will be generated by the putrefying mass with which he is to raise up the foundation between the old and new embankments. But has he entitled himself to attain these humane atchievements, by fulfilling the preliminary requisites of the law? Has he obtained the Prætorian, or Pro-Prætorian license, that of the governor and city council, to erect this embankment? Has he given security for all the damages which shall be occasioned by his works for ten years? Has he even carried his case before a jury of 12 brother riparians? Or does he fear to trust it even to those having similar interests with himself? lest the virtuous feelings of compunction for the fate of their fellow citizens should scout his proposition with honest indignation? And yet, until this permission, every spadeful of earth he moved was an outrage on the law, and on the public peace and safety, which called for immediate suppression.* What was to *64 be done with such an aggressor? Shall we answer in the words of the Imperial edict, on a similar occasion, that of breaking the banks of the Nile? Cod. 9. 38. 'Flammis eo loco consumatur, in quo vetustatis reverentiam, et propemodum ipsius imperii appetierit securitatem; consciis et consortibus ejus deportatione constringendis; sic ut nunquam supplicandi, eis, vel recipiendi civitatem vel dignitatem, vel substantiam, licentia tribuatur.' 'Let him be consumed by the flames in that spot in which he violated the reverence of antiquity, and the safety of the empire, let his accessories and accomplices be cut off by deportation from the possibility of supplicating forgiveness, or of being restored to country, dignities or possessions.' Our horror is not the less because our laws are more lenient.

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Remedies.

Such, then, were the facts, and such the state of the law, on which we were called, and repeatedly and urgently called, to decide: not indeed in all the fulness in which they have since appeared, but sufficiently manifested to show that an atrocious enterprise was in a course of execution, which if not promptly arrested, would end in a desolation for which we could never answer. The question before us was, What is to be done? What remedy can we apply, authorised by the laws, and prompt enough to arrest the mischief?

Abatement of Nuisance.

1. Were the case within the jurisdiction of our own laws, it's character and remedy would be obvious enough. A navigable river is a highway, along which all are free to pass. And as the obstructing a highway on the land, by ditches or hedges, or logs across it, or erecting a gate across it, is a common nuisance, so to weaken injuriously the current of a river, by drawing off a part of it's water, to obstruct it by moles, dykes, weirs, piles, or otherwise, is a common nuisance; and all authorities agree, that every one is allowed to remove or destroy a common nuisance. Hawkins, P. C. 1. 75. 12. The Marshal and posse, instead of pleading the order from the Secretary of State, have a right to say 'we did this as citizens, and the law is our authority:' and it would really be singular if, what every man may, or may not do, at his pleasure, the magistrate who is sworn to see the law executed, and is charged with the care of the public property and rights, is alone prohibited from doing; or if his order should vitiate an act which without it would have been lawful, or which he might have executed in person. It would be equally singular, and equally absurd, that the law should punish the magistrate for hindering Mr. Livingston from doing what itself had forbidden and would punish, and reward him with damages for *65 having been restrained *from what they had forbidden him to do. The law makes it a duty in a bystander to lay hands on a man who is beating another in the street, and to take him off. And yet it is proposed that the same law shall punish him for taking off one who was engaged, not in beating a single individual, but in drowning a whole city and country. This is not our law; it is not the law of reason; and I am persuaded it is no part of a system emphatically called *ratio scripta*. If it is, let the law be produced. Until it is, we hold every man

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authorised to stay a wrongdoer, in the commission of a wrong, in which himself and all others are interested.

2. By nature's law, every man has a right to seize and retake by force, his own property, taken from him by another, by force or fraud. Nor is this natural right among the first which is taken into the hands of regular government, after it is instituted. It was long retained by our ancestors. It was a part of their Common law, laid down in their books, recognised by all the authorities, and regulated as to certain circumstances of practice. Lambard, in his Eirenarcha. B. 2. c. 4. says, 'It seemeth that (before the troublesome raigne of king Richard the second,) the Common law permitted any person (which had good right or title to enter into any land,) to win the possession by force, if otherwise he could not have obtained it. For a man may see, (in Britton fo. 115.) that a certain respite of time was given to the disseisee, (according to his distance and absence,) in which it was lawful for him to gather force, armes, and his friends, and to throw the disseisor out of his wrongfull possession.' Hawkins in his Pleas of the crown, and all the Abridgments and Digests of the law say the same: but, not to take it at second hand, we will recur to the earliest authorities, written while it was yet the law of the land. Fleta in the time of E. 1. writes

Forcible entry.

'Si facta fuerit diseissina, primum et principale competit remedium quod ille qui ita disseisitus est, per se, si possit, vel sumptis viribus, vel resumptis (dum tamen sine aliquo intervallo, flagrante disseisinâ et maleficio) rejiciat spoliantem. Quem si nullo modo expellere possit, ad superioris auxilium erit recurrendum. Si autem verus possessor absens fuerit, tunc locorum distantia distinguere oportebit, secundum quod fuerit propè vel longè, quo tempore viz. scire potuit disseisinam esse factam, ut sic, allocatis ei rationabilibus di-

'If a disseisin has been committed, a first and principal remedy lies, that he who has been so disseised, by himself, if he can, or taking force, and retaking, (provided it be without any interval, the disseisin and wrong being yet flagrant,) may eject the spoliator. Whom, if he can by no means expel, resort is to be had to the assistance of a superior. But, if the rightful possessor were absent, then, regard must *be had *66 to the distance of the places, according as it was near or far off, at what time, for in-

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lationibus, primo die cum venerit, statim suum dejiciat disseisitorem; qui, si primo die, non possit, in crastino, vel die tertio vel ulterius, dum tamen sine fictitiâ, hoc facere poterit, vires sibi resumendo, arma colligendo, auxiliumque amicorum convocando.' Fleta L. 4. c. 2. And Bracton L. 4. c. 6. in almost totidem verbis; and Britton 'le premer remedie pour disseisine est al disseisi de recollier amys et force et sauns delay faire (après ceo que il le purra saver) engetter les disseisours.' Britton c. 44.

stance, he could know that a disseisin had been committed, that so, reasonable delays being allowed him, on the first day when he comes, he may immediately eject the disseisor, which if he cannot do on the first day, he may on the morrow, or third day, or later; provided however he do it without false pretences, by taking to himself force, collecting arms, and calling in the aid of his friends.' And Bracton L. 4. c. 6. almost in the same words; and Britton says, 'The first remedy for disseisin is for the disseisee to collect his friends and force, and without delay,(after he may know of it,) to eject the disseisors.'

This right, as to real property, was first restrained in England by a statute of the 5. R. 2. c. 7. which forbade entry into lands with strong hand; and another of the same reign, 15. R. 2. c. 2. authorised immediate restitution to the wrong doer, put out by forcible entry. And even at this day, in an *action* of trespass, for an entry, *vi et armis*, if the defendant makes good title, he is maintained in his possession, and the plaintiff recovers no damages for the force. Lambard 2. 4. Hawk. P. C. 1. 64. 3. And in like manner, the natural right of recaption by force still exists, as to personal goods, and the validity of their recaption. Hawk. 1. 64. 1. Kelway 92. is express. Blackstone, indeed, 3. 1. 2. limits the right of recaption to a peaceable one, not amounting to a breach of the peace; meaning, I presume, that the recaptor by force may be punished for the breach of the peace. So may the defendant in trespass for an entry *vi et armis*. Yet in an *action* of detinue for the personal thing retaken by force, the first wrong doer cannot recover it, nor damages for the recaption, any more than in the case of trespass for lands. So that to this day the law supports the right of recaption, as between the parties, although it will punish the public offence of a breach of the peace.

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When this natural right was first restrained among the Romans, I am not versed enough in their laws to say. It was not by the laws of the XII tables, which continued *long their only laws. From the expression of the Institute, '*divalibus constitutionibus*,' I should infer it was first restrained by some of the Emperors, predecessors of Justinian. L. 4. t. 2. §. 2. Roman law. *67

'Divalibus constitutionibus prospectum est, ut nemini liceat vi rapere vel rem mobilem, vel se moventem, licet suam eandem rem existimat. Quod non solum in mobilibus rebus, quæ rapi possunt, constitutiones obtinere censuerunt, sed etiam in invasionibus, quæ circa res soli fiunt.'

'By the Imperial constitutions it is provided that no one shall take by force a thing either moveable, or moving, although he considers it as his own.—Which the constitutions have ordained to take place, not only in moveable things, which may be taken, but also in intrusions which are made into lands.'

But I believe that no nation has ever yet restrained itself in the exercise of this natural right of reseising it's own possessions, or bound up it's own hands in the manacles and cavils of litigation. It takes possession of it's own at short hand, and gives to the private claimant a specified mode of preferring his claim. There are cases, of particular circumstance, where the sovereign, as by the English law, must institute a previous inquest: but in general cases, as the present, he enters at once on what belongs to his nation. This is the law of England. 'Whenever the king's [i. e. the nation's] title appears of record, or a possession in law be cast upon him by descent, escheat, &c. he may enter without an office found: for if his title appear any way of record, it is as good as if it were found by office: and if any one enter on him, even before his entry made, he is an intruder; he cannot gain any freehold in the land, nor does he put the king to an assize or ejectment, or take away his right of entry: for he cannot be disseised but by record. Stamford. Prærogativa regis. 56. 57. Com. Dig. Prærog. D. 71. the substance of the authorities cited.

What are the prescriptions of the Roman law in this case, I do not know; nor are they material but inasmuch as they may

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be the law of the case in Louisiana. A Spanish law before cited, p. 55. forbidding erections on the beds, or on the banks of rivers, says expressly, 'si alguno lo ficiese debe ser deribado.' 'If any one does it, it is to be destroyed.' And the constant practice of the Governors of demolishing such erections was the best evidence of the law we could obtain. Not skilled in their laws ourselves, we had certainly a right to consider the Governor and Cabildo as competent expositors of them, and as acting under their justification and prescription. We
*68 might reasonably think ourselves safe *in their opinions of their own law. In fact, if the immediate entry was permitted by the English law, and our own, we thought we might, *à fortiori*, conclude it permitted by those of the province. We had before us too the example of many of the states, and of the general government itself, which have never hesitated to remove by force the Squatters and Intruders on the public lands.* Indeed if the nation were put to action against every Squatter, for the recovery of their lands, we should only have lawsuits, not lands, for sale. While troops are on parade, should intruders take possession of their barracks, and shut the doors, are they to remain in the open air till an action, or even a writ of forcible entry replace them in their quarters? if in the interval of a daily adjournment, intruders take possession of the capitol, may not Congress take their seats again till an inquisition and posse shall reintroduce them? let him who can, draw a line between these cases. The correct doctrine is that so long as the nation holds lands in it's own possession, so long they are under the jurisdiction of no court, but by special provision. The United States cannot be sued. The nation, by it's immediate representatives, administers justice itself to all who have claims on it's public property. Hence the numerous petitions which occupy so much of every session of Congress in cases

Squatters.

Jurisdiction in whom.

* Squatters or Intruders on the public or Indian lands were repeatedly removed by the state of Virginia before its cession to Congress, by the old Congress, (see Journ. 15 June 1785,) by the present government at various times, and, as is believed, by other individual states on the ground of natural right only. *MS. Note.*

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which have not been confided to the courts. But when once they have granted the lands to individuals, then the jurisdiction of the courts over them commences. They fall then into the common mass of matter justiciable before the courts. If the public has granted lands to B. which were the legal property of A., A. may bring his action against B. and the courts are competent to do him justice. The moment B. attempts to take possession of A's lands, the writ of forcible entry, the action of trespass or ejectment, and the Chancery process furnish him a choice of remedies. The holders of property therefore are safe against individuals by the law; and they are safe against the Nation by it's own justice: and all the alarm which some have endeavoured to excite on this subject has been merely *ad captandum populum*. As if the people would not be safe in their own hands, or in those of their representatives; or safer in the hands of irresponsible judges, than of persons elected by themselves annually or biennially. The truth is, no injury can be done to any man by another acting either in his own or a public character, which may not be redressed by application to the proper organ to which that portion of the administration of justice has been assigned.

When it results to Courts.

3. Our third, and conclusive remedy was that prescribed by the act of Congress of 1807. c. 91. to prevent *settlements on lands ceded to the U. S. The Executive had been indulgent, perhaps remiss, in not removing Squatters from the public lands, under the general principles of law before explained and habitually acted on. This act therefore was a recent call on them to a more vigilant performance of their duty, in the special district of country lately ceded to them by France, with some modifications of its exercise on previous settlers. The act has two distinct classes of Intruders in view. 1. Those who, *before the passing of the act*, had possessed themselves of the lands, and were actually resident on them at the time of passing it: and 2. Those who should take possession *after the passage of the act*. 1. With respect to the class of Intruders *before* the passage of the act, the 2d section provides that, on renouncing all claim, they may obtain from the register or recorder, permission to remain on the lands, extending their occupation

Act of Congress.

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to 320 acres, § 3. which permissions are to be recorded; but, § 4. those not obtaining permission are, on three months notice, to be removed by the marshal. But Mr. Livingston was much too wise to qualify himself for the benefit of these sections, by an actual residence on the batture. *His* part of the act therefore is the first section which enacts that 'if any person shall take possession of any lands ceded to the U. S. by treaty, he shall forfeit all right to them, if any he hath; and it shall be lawful for the President of the U. S. to direct the Marshal, or the military, to remove him from the lands. Providing however that this removal shall not affect his claim until the Commissioners shall have made their reports, and Congress decided thereon.' The tribunal to which the legislature had specially delegated a power to take cognisance of the claims on the public lands in Orleans, and to inform them what lands were clear of claim, and free to be granted to our citizens, was a board of Commissioners: and the plain words and scope of the law were, to keep all claims and prior possessions *in statu quo*, until they could be investigated by these Commissioners, reported, and decided on by Congress. And this act indulgently provides that the right of a person removed by the Executive for irregularly taking possession of lands which he thought his own, should not be affected by this removal, but that he might still lay his claim before the Commissioners, and Congress would decide on it. Mr. Livingston's claim was clearly within the purview of the law. It was of lands 'ceded to the U. S. by treaty,' and he had 'taken possession of them *after the passage* of the act.' For the decree of the court was not till May 23, '07, and his possession was subsequent to that. If he should say, as his counsel seems to intimate, Opinions LXVII. that this was a *remitter* to him of the antient possession of Bertrand Gravier, I answer that it was no remitter against any one, because the case was *coràm non judice*, as will be shewn, and still less against the U. S. who were no parties to the suit: and if it had been a remitter, then I should have observed, that the order has been executed on a person not comprehended in it; for it was expressly restrained to possessions taken after the 3d of March '07, in that case the Marshal must justify himself, not under the order, but his personal right to remove a nuisance. But investigations, re-

Remitter.

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ports, and decisions of Congress were dangerous. It was safer to be his own judge, to seize boldly, and put the public on the defensive. He seizes the ground he claims, and refers his title to no competent tribunal. When ousted, according to the injunctions of the statute, and repossession taken on behalf of the U. S. he passes by the preparatory tribunal of the Commissioners, and endeavours to obtain a decision on his case by Congress in the first instance: in this too he has been disappointed. Congress have maintained the ground taken under the statute; and Mr. Livingston now demands the value of the lands from the magistrate on whom devolved the duty of executing the statute.

Taking now a brief review of the whole ground we have gone over, we may judge of the correctness of the decision of the Cabinet, as to their duty in this case. I trust it will appear to every candid and unbiassed mind, that they were not mistaken in believing Recapitulation.

That the Customs of Paris, the Ordinances of the French government, the Roman law as a Supplement to both, with the special acts of the Spanish and American legislatures, composed that system of law which was to govern their proceedings.

That, were this a case of Alluvion, the French law gives it to the Sovereign in all cases; and the Roman law to the private holder of *rural* possessions only.

That Bertrand Gravier had converted his plantations into a fauxbourg, and appendage of the city of New-Orleans; with the *previous* sanction of the Spanish government, according to his own declarations, by which those claiming under him are as much bound, as if made by themselves; and certainly by its *subsequent* formal recognitions, and confirmations, which acted retrospectively: and the character of the ground being thus changed from a Rural to an Urban possession, the Roman law of Alluvion does not act on it.

That even had his ground retained it's *rural* character, and admitting that the grant to him '*face au fleuve*' conveyed the lands to the water's edge, his sales, '*face au fleuve*' conveyed to his *purchasers the same right which the same terms had brought to him, and they, and not the plaintiff, now holds the rights of B. Gravier, whatever they were. *71

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That John Gravier having elected to take the estate as a purchaser by inventory and appraisement, the Batture, if Bertrand's, was not in that inventory, nor consequently purchased by John Gravier.

That the deed from him to De la Bigarre was fraudulent and void, as well by the *lex loci*, as on the face of the transaction.

That the decision of the court in his favour could in no wise concern the United States, who were neither parties to the suit, nor amenable to the jurisdiction.

And consequently, that under all these views of the French law, the Roman law, the conveyances '*face au fleuve*' the purchase by inventory, and the fraudulency of the deed to Bigarre, the plaintiff's claim is totally unfounded. And, if void by any one of them, it is as good as if void by every one.

But it has appeared further that the batture had not a single characteristic of alluvion:

That the *bank* of a river is only what is above the high water mark:

That all below that mark is *bed*, or alveus, of which the batture is that portion between the high, and low water mark, which we call the *beach:*

That it serves, as other beaches do, for a port while covered, and Quai uncovered: and is the only port in the vicinity of the city which river craft can use.

That as a part of the *bed* of the river, it is purely public property.

That it is not lawful for an individual to erect, on either the bed or bank of a river, any works which may affect the convenience of navigation, of the harbour or Quai, or endanger adjacent proprietors on either side of the river.

That though it is permissible to guard our own grounds against the current of the river, yet, so only, as to be consistent with the convenience and safety of others.

That of this the legal magistrates are to be judges in the first instance; but even *their* errors are to be guarded against by an indemnification for all damages which shall actually accrue to individuals within a given time.

That Mr. Livingston's works, in a single flood, had given alarming extent, both in breadth and height, to the batture:

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had turned the efforts of the river against the lower suburbs, and habitations, not before exposed to them: that they would deprive the public of what was their Quai in low water, and harbour* in times of flood: that, by narrowing *72
the river one fourth, it must raise it in equivalent proportion, to discharge it's waters: that this would sweep away the levée, city, and country, or quadruple the bulk of the levée, and the increased danger to which that would expose it: and, even then, would infect the city, by the putridity of the new congestions, with pestilential diseases, to which it's climate is already too much predisposed.

That Mr. Livingston was doing all this, of his own authority, without asking permission from the public magistrate, or giving any security for the indemnity of injured citizens:

That under the pressure of these dangers, the Executive of the nation was called on to do his duty, and to extend the protection of the law to those against whose safety these outrages were directed:

And that the authorities given by the laws, 1. For preventing obstructions in the beds, or banks of rivers. 2. For re-seising public property intruded on; and 3. For removing intruders from it by force, were adequate to the object, if promptly interposed.

On duly weighing the information before us, which though not as ample as has since been received, was abundantly sufficient to satisfy us of the facts, and has been confirmed by all subsequent testimony, we were all unanimously of opinion, that we were authorised, and in duty bound, without delay to arrest the aggressions of Mr. Livingston on the public rights, and on the peace and safety of the city of New-Orleans, and that orders should be immediately dispatched for that purpose, restrained to intruders since the passage of the act of March 3. The Secretary of State accordingly wrote the letter of Nov. 30, to the Governor, covering instructions for the Marshal to remove immediately, by the civil power, any persons from the batture Ste. Marie, who had taken possession of it since the 3d of March, and authorising the Governor, if necessary, to use military force; for which purpose a letter of the same date was written by the Secretary at war to the commanding officer at New-Orleans. This force

Orders of the Government.

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however was not called on. The instructions to the Marshal were delivered to him about 9 o'clock in the morning of the 25th of Jan. 1808. [Dorgenoy's letter to the Governor] he im-
Proceedings under them.
mediately went to the beach, and ordered off Mr. Livingston's labourers. They obeyed; but soon after returned. On being ordered off a second time, the principal person told him that he was commanded by Mr. Livingston not to give up the batture until an adequate armed force should compel him. And, in the mean time, Mr. Livingston had procured, from a single judge of the superior court
*73
of the territory,* an order, purporting to be an injunction, forbidding the marshal to disturb Edward Livingston in his possession of the batture, under pain of a contempt of court. The marshal, placed between contradictory orders, of the national government as to the property of the nation, and a territorial judge without jurisdiction over it, obeyed the former; collected a posse comitatus, ordered off the labourers again, who peaceably retired; and no further attempts were afterwards made to recommence the work.

Chancery Jurisdiction.
I have said that the marshal received an order, purporting to be an injunction. An authoritative injunction it could not be; because that is a Chancery process, and no Chancery jurisdiction has been given by any law to the superior court of that territory. It's judges were first established by the act of Congress of 1804. c. 38. with commissions for four years, and certain specified powers, which it is unnecessary to state, because an act of March 2, of the next year, c. 83. established, in that territory, 'a government in all respects similar to that exercised in the Missisipi territory,' which government had been established by an act of 1798. c. 5. 'in all respects similar to that in the territory North-west of the Ohio.' So that we are to find all their powers in the Ordinance of 1787, for the North-Western territory, in which are the following words. 'There shall be appointed a court to consist of three judges, any two of whom to form a court, who shall have *a common law jurisdiction*, and their commissions shall continue in force during good behaviour.' And again 'The inhabitants of the said territory shall always be entitled to the benefits of the writ of *Habeas corpus*, and of the trial by jury.' New commissions were accordingly given to the judges appointed

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under the first law, and, instead of their former powers, they were now to have *a common law jurisdiction*. By these words certainly no *chancery jurisdiction* was given them. Every one knows that common law jurisdiction is a technical term, used in contradistinction to a chancery jurisdiction, and exclusive of that, the common law ending where the chancery begins. The one authority is here given, and therefore they have it; the other is not given, and therefore they have it not. For they have no authority but that which is given by the legislature. If they have not chancery powers, then, by this law, there remains but one other source from which they can legally derive it. The act of 1804 before mentioned § 11, says 'the laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified, or repealed by the legislature.' We have seen that the laws in force were the French and Roman, with perhaps some occasional Spanish regulations. It being perfectly understood that these were not meant to be included in the *change, it follows that the term *common law*, when 74* applied to this territory, must be equivalent to the common law of that land, or the law of the land. Was then the establishment of the French and Roman laws an establishment of the chancery system of law? Will it be said that the Roman and Chancery laws, for instance, are the same? That the *civil law*, and the *chancery* are synonymous terms, both meaning the same system? Nobody will say that. The system of chancery law is partly concurrent, but chiefly supplementary and corrective of that of the common law. It sometimes corrects the harshness of the letter, where that includes what was not intended. It gives remedies in certain cases where that gave none, and more perfect remedies in other cases. It is adapted to the common law as one part of an indenture is to it's counterpart. It is formed to tally with that in all it's prominences and recesses, it's asperities and defects, and with no other body of law on earth. It consists of a set of rules and maxims, modified by the English Chancellors thro' a course of several centuries, derived from no foreign model, but contrived to reduce specifically the principles of common law to those of justice. The Roman law has something similar in it's *Jus Prætorium*, where the discretion of the Prætor was permitted to mollify and

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correct the harshness of the *leges scriptæ*. But to apply the *Jus Prætorium* to our common law, or our chancery to the *leges scriptæ* of the Romans, would be to apply to one thing the tally of another, or to mismatch the parts of different machines, so as to render them inconsistent and impracticable. Our chancery system is as different from the civil, as from the common law. All systems of law indeed profess to be founded on the principles of justice. But the superstructures erected are totally distinct. The chancery then being a system clearly distinct from that of the French and Roman laws, it cannot be said that the legislature of the U. S. by establishing the French and Roman laws in Orleans, established there the chancery system. It will not be pretended that the process of *subpœna*, used in the present case, and the sole and peculiar original process of chancery, is a civil law process. It is known to have been the invention of Waltham, Chancellor of Richard II. founded on the statute of Westminster the 2d c. 24. giving writs *in consimili casu*.

Might it be urged (for I am really at a loss to conjecture on what grounds this power has been assumed) that possessing under the act of '04, the powers of the chancery combined with those of the French and Roman laws, the subsequent act which gave them a common law jurisdiction, did not take away the others? *In totidem verbis* it did not, but in effect it did completely, by changing the government into one in all respects similar to that in the Mississipi territory, where there was no chancery jurisdiction. Moreover there is not a word in
*75 the act of '04, which gives them *chancery jurisdiction. It says, 'they shall have jurisdiction in all criminal cases, and original and appellate jurisdiction in all civil cases of the value of 100 dollars, and the laws in force at the commencement of this act shall continue in force.' Here then is their jurisdiction, and the particular system of law according to which they are to exercise it, and the chancery made no part of that system. This argument too would suppose that to the French, the Roman, the Spanish and the Chancery laws, the common law was also added. This would be an extraordinary spectacle, indeed, and the imputation of such an intention would be an insult on the legislature. Their laws have always some rational object in view; and are so to be construed, as to produce order and justice. But this construction, establishing so many systems, and

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these inconsistent and contradictory, would produce anarchy and chaos, and a dissolution of all law, of all rights of person or property. And what would be the consequences of carrying on a system of chancery concurrent with the French and Roman laws? A case is brought, for instance, into their court of chancery. I ask the honourable judges, is the law of chancery, in this case, the same as the civil law? If the same, what need of calling in the system of chancery? If different, will you decide against the law established by the legislature? If you carry on two systems, the one of which, in any case, gives a right to A. and the other to B. the suitor who covets his neighbour's property needs only to chuse that court, the rules of which will give it to him. Thus all rights will be set afloat between two opposite systems. The wisdom of the legislature therefore has been as sound in not giving a chancery jurisdiction concurrently with the civil law, as the judges have been ill-advised in usurping it. And have they adverted to the national feelings, when they have ventured, on their own authority, to abolish the trial by jury pledged by the Ordinance to the inhabitants for ever? Whoever wishes to take from his opponent the benefit of this trial, has only to bring his suit in the court of chancery. In this very case, on which the well being of a great city is suspended, no jury was called in. The judges took upon themselves to decide both fact and law; aware, at the same time that a jury could not have been found in Orleans, which would not have given a contrary decision. I shall not ascribe either favouritism, or intentional wrong to them: but they ought not to be surprised, if those do whose interests and safety are so much jeopardised by this shuffle of the judges into the place of the jury. It is much regretted that these respectable judges have set such an example of acting against law. It will be more regretted if they do not, by the spontaneous exertion of their own good sense and self-denial, tread back their steps, and perceive that there is more honour and magnanimity in correcting, than *persevering in an error. They had before them 76*
too the example of their neighbours, of the Missisipi territory, whose government was expressly made the model of theirs. Their judges, like themselves, entitled to common law jurisdiction only, and sensible it needed the mollifying hand of the chancery, did not think the assumption of it within their

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competence. The territorial legislature therefore invested them with the jurisdiction. The Judiciary power of the Indiana territory, modelled by the same Ordinance, was enlarged in like manner by the local legislature. And yet the Orleans territory, least of all needed the aid of a Chancery, as possessing already a corresponding corrective, well adapted to the body of their law, to which the system of Chancery was entirely inapplicable.

Although I had before noted, pages 16, 68. that the decree of this court was a nullity as to the United States, 1. Because they were not a party, nor amenable to their tribunal; 2. Because also it was on a subject over which they had no jurisdiction, I have thought it useful to prove it a nullity; 3dly. Because the result of a process, and of a course of pleading and trial belonging to a court whose powers they do not possess by law, in which course of action the law considers them as mere private persons, is entitled to the obedience of no one. I have done this the rather because it has been seised as a ground of censure on the Executive, as violating the sanctuary of the judicial department, and of inculpating the Marshal, who, placed between two conflicting authorities had to decide which was legitimate, and decided correctly, as I trust appears, in obeying that which ordered him to remove the plaintiff from an usurped possession.

Act of territorial Legislature.

The territorial legislature, three weeks after, took up the subject, and passed an act prescribing in what manner riparian proprietors should proceed, who wished to make new embankments in advance of those existing. This gave to Mr. Livingston an easy mode of applying for permission to resume his enterprise; and had he obtained a regular permission, certainly it would have been duly respected by the National executive. On the 1st of March I received from Governor Claiborne a letter of Jan. 29. informing me of the execution of our orders, and covering a vote of thanks from the legislative council and House of Representatives of Orleans, for our interposition: and on the 7th of the same month, I laid the case before Congress by the following message.

Message to Congress.

'To the Senate and House of Representatives of the United States. In the city of New-Orleans and adjacent to it, are sundry parcels of ground, some of them with buildings and other improvements on them, which

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it is my duty to present to the attention of the legislature. The title to *these grounds appears to have been retained in the former sovereigns of the province of Louisiana, as public fiduciaries, and for the purposes of the province. Some of them were used for the residence of the Governor, for public offices, hospitals, barracks, magazines, fortifications, levées, &c. others for the town house, schools, markets, landings, and other purposes of the city of N. Orleans. Some were held by religious corporations, or persons; others seem to have been reserved for future disposition. *77

To these must be added a parcel called the batture, which requires more particular description. It is understood to have been a shoal, or elevation of the bottom of the river, adjacent to the bank of the suburb St. Mary, produced by the successive depositions of mud during the annual inundations of the river, and covered with water only during those inundations. At all other seasons it has been used by the city, immemorially, to furnish earth for raising their streets, and court yards, for mortar and other necessary purposes, and as a landing or Quai for unlading firewood, lumber, and other articles brought by water. This having lately been claimed by a private individual, the city opposed the claim on a supposed legal title in itself: but it has been adjudged that the legal title was not in the city. It is however alleged that that title, originally in the former sovereigns, was never parted with by them, but was retained by them for the uses of the city and province, and consequently has now passed over to the U. S. Until this question can be decided under legislative authority, measures have been taken according to law, to prevent any change in the state of things, and to keep the grounds clear of intruders. The settlement of this title, the appropriation of the grounds and improvements formerly occupied for provincial purposes to the same, or such other objects as may be better suited to present circumstances; the confirmation of the uses in other parcels to such bodies corporate, or private, as may of right, or on other reasonable considerations, expect them, are matters now submitted to the determination of the legislature. The papers and plans now transmitted, will give them such information on the subjects as I possess, and, being mostly originals, I must request that they

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may be communicated from the one to the other house, to answer the purposes of both. TH: JEFFERSON. *Mar.* 7, 1808.'

Removal of the case before them.

This removal of the case before Congress closed the official duties of the Executive, and his interference respecting these grounds: except that, the attorney of the United States for the district of Orleans having given written permission to the inhabitants to use the batture as before, this, on the application of Mr. Livingston, was directed to be withdrawn by a letter from the Secretary of State, of Oct. 5. '09. This was correct. It placed
78* the inhabitants exactly *on their former footing, without either permission or prohibition on the part of the National government.

The *possession*, the only charge of the Executive, was now cleared from intrusion, and restored to it's former condition: and the question of title committed to the Legislature, the only authority competent to it's decision. If they considered the ground taken by the Executive as incorrect, their vote, or their reference of the case to Commissioners, would correct it: and as to damages, if any could justly be claimed, they were due, as in other cases, not from the judge who decides, but the party which, without right, receives the intermediate profits. If, on the other hand, Congress should deem the public right too palpable, (as to me it clearly appears,) and the claim of the plaintiff too frivolous, to occupy their time, they would of course pass it by. And certainly they might as properly be urged to waste their time in questioning whether the beds of the Potomak, the Delaware, or the Hudson, were public or private property, as that of the Missisipi. Their refusing to act on this claim therefore for five successive sessions, though constantly solicited, and their holding so long the ground taken by the Executive, is an expression of their sense that the measure has been correct.

Responsibility of a public functionary.

I have gone with some detail into the question of the plaintiff's right, because, however confident of indulgence, in the case of an honest error, I believed it would be more satisfactory to show, that in the exercise of the discretionary power entrusted to me by Congress, a sound discretion had been used, no act of oppression had been exercised, no error committed, and consequently

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no wrong done to the plaintiff. I have no pretensions to exemption from error. In a long course of public duties I must have committed many. And I have reason to be thankful, that, passing over these, an act of duty has been selected as a subject of complaint, which the delusions of self interest alone could have classed among them, and in which, were there error, it has been hallowed by the benedictions of an entire province, an interesting member of our national family, threatened with destruction by the bold enterprise of one individual. If this has been defeated, and they rescued, good will have been done, and with good intentions. Our constitution has wisely distributed the administration of the government into three distinct, and independent departments. To each of these it belongs to administer law within it's separate jurisdiction. The judiciary in cases of *meum* and *tuum*, and of public crimes; the Executive, as to laws executive in their nature; the legislature in various cases which belong to itself, and in the important function of amending and adding to the system. Perfection in wisdom, as well as in integrity, is neither required, nor expected in these agents. It belongs not to man. Were the judge who, *79 deluded by sophistry, takes the life of an innocent man, to repay it with his own; were he to replace, with his own fortune, that which his judgment has taken from another, under the beguilement of false deductions; were the Executive, in the vast mass of concerns of first magnitude, which he must direct, to place his whole fortune on the hazard of every opinion; were the members of the legislature to make good from their private substance every law productive of public or private injury; in short were every man engaged in rendering service to the public, bound in his body and goods to indemnification for all his errors, we must commit our public affairs to the paupers of the nation, to the sweepings of hospitals and poor-houses, who, having nothing to lose, would have nothing to risk. The wise know their weakness too well to assume infallibility: and he who knows most, knows best how little he knows. The vine and the fig-tree must withdraw, and the briar and bramble assume their places. But this is not the spirit of our law. It expects not impossibilities. It has consecrated the principle that it's servants are not answerable for honest error of judgment. 1 Ro. Abr. 92. 2 Jones 13. 1 Salk. 397. He who has done his

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duty honestly, and according to his best skill and judgment, stands acquitted before God and man. If indeed a judge goes against law so grossly, so palpably as no imputable degree of folly can account for, and nothing but corruption, malice or wilful wrong can explain, and especially if circumstances prove such motives, he may be punished for the corruption, the malice, the wilful wrong; but not for the error: nor is he liable to action by the party grieved. And our form of government constituting it's respective functionaries judges of the law which is to guide their decisions, places all within the same reason, under the safeguard of the same rule. That in deciding and acting under the law in the present case, the plaintiff, who may think there was error, does not himself believe there was corruption or malice, I am confident. What? was it my malice or corruption which prompted the Governors and Cabildoes to keep these grounds clear of intrusion? Did my malice and corruption excite the people to rise, and stay the parricide hand uplifted to destroy their city, or the grand jury to present this violator of their laws? Was it my malice and corruption which penned the opinion of the Attorney General, and drew from him a confirmation, after two years of further consideration, and when I was retired from all public office? Was it my malice or corruption which dictated the unanimous advice of the heads of departments, when officially called on for consultation and advice? Was it my malice and corruption which procured the immediate thanks of the two houses of legislature of the ter-
*80 ritory of Orleans, and a renewal of the same thanks *for the same interference, in their late vote of February last? Has it been my malice and corruption which has induced the national legislature, through five successive sessions, to be deaf to the doleful Jeremiads of the plaintiff, on his removal *from his estate* at New-Orleans? Have all these opinions then been honest, and mine alone malicious and corrupt? Or has there been a general combination of all the public functionaries Spanish, French and American, to oppress Mr. Livingston? No. They have done their duties, and his Declaration is a libel on all these functionaries. His counsel, indeed, has discovered [Opinions LXXIV] that we should have had legal inquests taken, writs of enquiry formed, prosecutions for penalties, with all the *et cæteras* of the law. That is that we should be playing push-pin

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with judges and lawyers, while Livingston was working double tides to drown the city. If a functionary of the highest trust, acting under every sanction which the constitution has provided for his aid and guide, and with the approbation, expressed or implied, of it's highest councils, still acts on his own peril, the honours and offices of his country would be but snares to ruin him. It is not for me to enquire into the motives of the plaintiff in this action. I know that his understanding is of an order much too high to let him believe that he is to recover the value of the batture from me. To what indirect object he may squint with one eye, while the other looks at me, I do not pretend to say. But I do say, that if human reason is not mere illusion, and law a labyrinth without a clue, no error has been committed: and, recurring to the tenor of a long life of public service, against the charge of malice and corruption I stand conscious and erect.

TH: JEFFERSON.

Monticello, July 31, 1810.

ERRATA.

Page 4, line 24 of the Spanish quotation, last word of the said line, *for* "di," *read* de.

Page 60, line 8 of Latin quotation, *for* "sicutper," *read* sicut per.

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ALIEN ENEMIES.

The opinion of CHIEF JUSTICE TILGHMAN of *Pennsylvania*, delivered on the 22d *November*, 1813, on a *Habeas Corpus*, in the case of *Charles Lockington*, an alien enemy.

TILGHMAN, C. J. From the return to this writ of *Habeas Corpus*, and the evidence which has been produced, it appears, that *Charles Lockington*, who is a subject of the British king, came into the *United States* before the declaration of war, and has never been naturalized. His business was connected with commerce; and on the 18th of July, 1812, he reported himself to *John Smith*, marshal of the district of *Pennsylvania*, as an alien, and British subject. On the 19th of March, 1813, he applied, as an alien enemy, for the marshal's passport, to repair to *Lancaster*, which was granted; and, at his own request, afterwards changed to *Reading;* in pursuance of an order issued from the office of the secretary of state, by which all alien enemies (with certain exceptions, not including the case of Mr. *Lockington*) were directed to retire, to a place above forty miles from tide water, to be designated by the marshal. On the 9th of the present month, the marshal found Mr. *Lockington* in this city, in violation of the order above mentioned; upon which he required him to retire to *Reading*. This being refused by Mr. *Lockington*, the marshal took him into his custody, and placed him, for safe keeping, in the debtor's apartment of the prison of the city and county of Philadelphia, until he could be conveyed, or would consent to retire, to *Reading*, or should be discharged by due course of law. The reason assigned by *Lockington*, for coming from *Reading* to *Philadelphia*, was the want of money to subsist in *Reading*; and he offered to return thither, if the marshal would furnish him with money. War having been declared by the congress of the *United States*, on the 18th day of *June*, 1812, proclamation of that event was made by the president on the day following. On the 7th day of *July*, in the same year, a notice was issued from the department of state, and published in those newspapers, in which the laws

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of the *United States* are published, by which all British subjects were required to make report of themselves to the marshals of the districts, in which they resided; and at the same time the several marshals were directed to cause the laws, which relate to alien enemies, to be published, in order that such persons might be informed of the situation in which they stood. Those laws were, accordingly, published. On the 23d of *February*, 1813, an order was issued from the department of state, and published in the newspapers, by which "alien enemies, residing "or being within forty miles of tide water, were required "forthwith to apply to the marshals of the states, or territories, "in which they respectively resided, for passports, to retire to "such places, beyond that distance from tide water, as should be "designated by the marshals;" subject to certain exceptions, not affecting the present case. At the same time the several marshals of the *United States* received instructions from the department of state, to take into custody, and convey to the places assigned to them, all persons to whom the said requisition was applicable, and who did not immediately conform to it. On the 15th of *April*, 1813, the several marshals were informed, by a notice from the department of state, that the president had appointed *John Mason*, esquire, commissary general for prisoners of war, "including the superintendance of alien enemies;" and that, in future, all letters and documents on those subjects, were to be addressed to that gentleman; and all instructions from him in relation to the same, were to be obeyed; unless otherwise directed from the department of state. On the 31st of *May* 1813, a circular letter, signed by *John Mason*, was addressed to the several marshals of the *United States*, and published in the newspapers. This letter was dated "Office of "Commissary General of Prisoners, *Washington*, *May* 31, "1813," and is expressed in the following form: "*The Presi-* "*dent*, being desirous of defining, more particularly, the treat- "ment of alien enemies, and of extending as much indulgence "to them, as may be compatible with the precautions made ne- "cessary by the present state of things, *directs*, that, in regard "to such as may be within your district, you will be governed "by the following rules. You will cause to be removed, as "heretofore prescribed, if not already done, under the former "orders from the department of state, all who are not females,

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"or under eighteen years of age, who are not labourers, me-
"chanics, or manufacturers, arrived in the country previous to
"the declaration of war, and actually employed in their several
"vocations: subject, however, to the following modifications."
Then follow the modifications, none of which apply to Mr. *Lockington*.—These are all the facts of any importance on the present question.

It has been contended, that the orders issued from the public offices, are not to be considered as the acts of the president; and that, if they are his acts, they are not authorised by law.—Both these objections shall be considered; but I shall first advert to the point, introduced in the suggestion filed by the marshal, which goes to the jurisdiction of a state judge, in cases like the present. It is supposed that the state judges have no authority to issue a writ of *habeas corpus*, because the power of declaring war being vested in the congress of the *United States*, all matters appertaining to that subject, must be under their control; that congress, if it had pleased them, might have considered alien enemies as prisoners of war, who are not entitled to the benefit of a writ of *habeas corpus*—and, finally, that as the laws of the *United States* have given to the state judges, a certain jurisdiction, with respect to alien enemies (which I shall have occasion to mention hereafter) but have not given to them authority to interpose by a writ of *habeas corpus*, that writ ought not to be issued. In answer to these suggestions, it is to be observed, that the authority of the state judges, in cases of *habeas corpus*, emanates from the several states, and not from the *United States*. In order to destroy their jurisdiction, therefore, it is necessary to shew, not that the *United States* have given them jurisdiction; but that congress possess, and have exercised, the power of taking away that jurisdiction, which the states have vested in their own judges. Our act of assembly directs, that, in all cases, "where any person, not being com-
"mitted or detained, for any criminal, or supposed criminal
"matter, shall be confined or restrained of his liberty, under
"any colour or pretence whatsoever," he shall be entitled to a writ of *habeas corpus*. Now, it is no answer to this law, to say, that, being made before the present constitution of the *United States* was established, it could not be intended to apply to cases arising under the constitution. The people of *Pennsyl-*

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vania still remain citizens of the commonwealth, as well as of the *United States;* and it is of as much importance to them to be relieved from unlawful imprisonment, under colour of authority derived from the *United States*, as from any other imprisonment. When the present federal constitution was adopted, the people were not easy until they had obtained an amendment, declaring that the powers not delegated to the *United States*, by the constitution, nor prohibited by it to the states, were reserved to the states respectively, or to the people. A writ of *habeas corpus* must, therefore, be issued, in all cases, where the right to issue it has not been given up to the *United States*. That this right has not been given up, was my opinion, delivered in the case of *Olmstead*, where I assigned reasons which I shall not now repeat. But that is not all. It is a principle, well established, that even in cases, where congress might assume an exclusive jurisdiction, the authority of the states remains, until such a jurisdiction is assumed. There are many instances, in which the powers of the *United States* are suffered to lie dormant; such as the power of establishing uniform laws on the subject of bankruptcies; and, while the power remains dormant, the several states regulate the subject. In subjects also within the jurisdiction of congress, when they do legislate, the authority of the states is taken away, only so far as the law of the *United States* declares. This is exemplified in the act establishing the judicial courts of the *United States*, where it will be found, that, in some instances, the courts of the *United States* are vested with an exclusive jurisdiction; but in many more they have jurisdiction concurrent with the courts of the several states.—And, although it is true, that, by the terms of the act, the courts of the *United States* have only a concurrent jurisdiction, yet, I apprehend the construction would be the same, if the express terms had been omitted. By the 14th section of the same act, power is given to the judges of the *United States* to grant writs of *habeas corpus*, for the "purpose "of an enquiry into the cause of commitment; provided that "they shall, in no case, extend to prisoners in gaol, unless "where they are in custody, under, or by colour, of the autho- "rity of the *United States*, or committed for trial, before some "court of the same, or are necessary to be brought into court to 'testify." Now, if it had been intended to exclude the state

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judges, this is the place in which we might expect to find evidence of such intention: for, the subject was full in the mind of the legislature, as appears by the care with which they restrained their own judges, from interfering with commitments, not under the authority of the *United States*.

The judicial power of the *United States* extends to all cases in law or equity, arising under the constitution, the laws of the *United States*, and the treaties made under their authority.—Supposing that congress had the right to assume an exclusive jurisdiction, in all cases founded immediately on these subjects, the exercise of it would be intolerably grievous, without a great increase of courts and judges: and, even then, it would often happen, that the state courts would have to decide on the constitution, laws, and treaties of the *United States*, on questions arising, collaterally, in causes within their jurisdiction.—Still the authority of the *United States* may be preserved, by retaining, as they have retained, an appeal to their own courts. But it seems to be the general opinion, that from a decision on a *habeas corpus*, no appeal or writ of error lies; and, thus, points of vital importance to the *United States*, may be determined by state judges, without an opportunity of revision. This may certainly be a very serious evil, but it does not appear to be without remedy. For, although by the general principles of law, an appeal or writ of error might not lie; yet the subject being within the power of congress, they may regulate it as they please. As to an attempt to take away from the state courts altogether the right of issuing a writ of *habeas corpus*, in any case where a man pretends to justify an imprisonment under the authority of the *United States;* whenever the subject shall be brought before congress, it will be found to be attended with very great, if not insuperable difficulties.

I have said thus much on the point of jurisdiction (although I consider it as having been long settled and acted upon by the supreme court of this state) because some persons of high standing in other states, for whose opinions I entertain the most sincere respect, have expressed doubts on the subject. It is a matter deserving the greatest consideration, in which the people of the different states are deeply interested. The inconvenience of clashing opinions between federal and state judges, may sometimes be felt; but when I consider the situation of a *Penn-*

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sylvanian, imprisoned unlawfully, by colour of a pretended authority from the *United States*, on the banks of the *Ohio*, or the shore of *Lake Erie*, with only one federal judge to whom he can apply, and that judge in the city of *Philadelphia*, I feel as little *inclination* as I have *right*, to surrender the authority of the commonwealth.

But there is another objection to this *habeas corpus*, applicable equally to the judges of the states, and of the *United States:* it is, that Mr. *Lockington* is in the situation of a *prisoner of war*. If he be so, he is not entitled to a privilege, which never could have been intended for persons of that description. A prisoner of war is subject to the laws of war; he is brought among us by force; and his interests were never, in any manner, blended with those of the people of this country. He has no municipal rights to expect from us. We gave him no invitation, and promised him no protection. His object was to injure us; and we bring him hither solely for safe keeping. Far different is the case of a great body of people, who, although now placed in the situation of enemies, by events over which they had no control, yet, in their hearts, may bear no enmity to the *United States:* nay, who may even prefer this country to their native soil. Many of them came among us, with a view of sharing our fortunes. Our laws held out invitations; they were suffered to acquire property, personal and real; we permitted them to swear, that they intended to renounce their native sovereign, and become fellow citizens with us. Many, it is true, came merely on business, without such intent, and may be really inimical. But even they had that implied promise, which civilized nations have long been supposed to make, that, in case of sudden war, there should permission to depart in a reasonable time, without injury to person, or property. I am far from denying, however, that the condition of these people is to be decided, not by a reference to the usual courtesy of nations, but by our own laws. Congress had the power of legislating on the subject: they have exercised that power; and their acts are paramount to all foreign customs. It is these acts which we are now to consider, and it will be found, that they are such as the most civilized nation need not blush to avow. They preserve a sacred regard for treaties; and, in cases where no treaty exists, they vest the president of the *United States* with full powers, to be

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exercised "according to the dictates of humanity, and national "hospitality:" not forgetting, however, a due regard to the public safety. It has lately been decided, by the supreme court of *New York*, in the case of *Clark* vs. *Money* (10 *Johns.* 59.) that *British* aliens residing in the *United States*, so far from being considered as prisoners of war, may sue, and be sued, as in time of peace.

The act respecting alien enemies, was passed on the 6th of July, one thousand seven hundred and ninety-eight. In considering it, I shall not pursue the wide range, which was taken in the argument of this case. In fixing its true construction, it is of no importance, under what administration it was enacted; by whom it was brought forward; or by whom advocated, or opposed, on its passage. It is the law of the land; and, being so, it becomes the duty of every individual to obey, and of every court to enforce obedience.

It begins by enacting, that when war is declared, or invasion by a foreign nation is perpetrated, attempted, or threatened, and the president of the *United States* shall have made public proclamation of the event, "all natives, citizens, denizens, or "subjects, of the hostile nation, or government, being males of "the age of fourteen years and upwards, who shall be within "the *United States*, and not actually naturalized, shall be liable "to be apprehended, restrained, secured, and removed, as alien "enemies." Here is a broad proposition, standing as a foundation, for summary proceedings, against persons who are declared to be in the situation of *alien enemies*. I do not consider, as has been contended by Mr. *Lockington's* counsel, that the *apprehending*, *restraining* and *securing*, here mentioned, are to be intended solely for the purpose of *removal out of the United States*. It is a provision for the public safety; which may require, that the alien should *not* be *removed*, but kept in the country under proper restraints; and the nature and degree of these restraints, in cases where there has been no misbehaviour, may depend, in some measure, on the treatment which the hostile government gives to citizens of the *United States*, who may chance to be within its power. The act then proceeds to declare that "the president of the *United States* shall be authorised, in "any event as aforesaid, by his proclamation thereof, or other "public act, to direct the conduct to be observed on the part of

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"the *United States*, towards the aliens, who shall become liable "as aforesaid; the manner and degree of the restraint, to which "they shall be subject; and in what cases and upon what secu- "rity, their residence shall be permitted; and to provide for "the removal of those, who, not being permitted to reside "within the *United States*, shall refuse, or neglect, to depart "therefrom; and to establish any other regulations, which shall "be found necessary in the premises, and for the public safety." Then follows a proviso, for securing the observance of treaties, which is not material in this case; because, at the time of the declaration of war, there was no treaty, regulating the subject, in existence, between the *United States* and *Great Britain*.

In the second section of the act it is enacted:

"That after any proclamation shall be made as aforesaid, it "shall be the duty of the several courts of the *United States*, "and of each state, having criminal jurisdiction, and of the seve- "ral judges and justices of the courts of the *United States*, and "they shall be, and are hereby respectively, authorised, upon "complaint, against any alien enemy, or alien enemies, as afore- "said, who shall be resident and at large within such jurisdic- "tion or district, to the danger of the public peace or safety, "and contrary to the tenor or intent of such proclamation, or "other regulations which the president of the *United States* "shall and may establish in the premises, to cause such alien "or aliens to be duly apprehended and convened before such "court, judge or justice; and after a full examination and hear- "ing on such complaint, and sufficient cause therefor appearing, "shall and may order such alien or aliens, to be removed out "of the territory of the *United States*, or to give sureties of "their good behaviour, or to be otherwise restrained, conform- "ably to the proclamation or regulations which shall and may "be established as aforesaid, and may imprison, or otherwise "secure such alien or aliens, until the order which shall and may "be made, as aforesaid, shall be performed."

It cannot be doubted, but that the provision in the first section, considered without reference to the second, authorises the president to establish a regulation, that all alien enemies of a certain description, shall retire immediately to a place to be appointed by the marshal; and that, in case of non-compliance, the marshal shall remove them. But the second section, having

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authorised certain courts and judges, upon complaints made against alien enemies, to have them apprehended, and brought before them; and, after hearing, to make such order as may be necessary, for carrying the regulations of the president into effect; there is not wanting strong colour for an argument, that the only manner of executing the regulations, is by complaint to a court, or judge. This is a point well worthy of serious consideration. I have considered it attentively; and I shall give the reasons, which have induced me to conclude, that, notwithstanding the second section, the president was authorised to make an order for the removal of the alien enemy by the marshal, in the first instance. It is never to be forgotten, that the main object of the law is, to provide for the safety of the country, from enemies who are suffered to remain within it. In order to effect this safety, it might be necessary to act on sudden emergencies.— It is well known, that the *United States* are exposed to great danger, in a war with an enemy who commands the sea. Bounded by the *Atlantic* ocean to a great extent, with numerous bays and navigable rivers, penetrating the very heart of the country; there is no knowing when, or where, the attack may be made. Without incurring the charge then of undue severity, prudence might require, that alien enemies residing in large cities, should be removed with more expedition than the formalities of law admit. The president being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly we find that the powers vested in him are expressed in the most comprehensive terms. He is to make any regulations which he may think necessary for the public safety, so far as concerns the treatment of alien enemies. It is certain, that these powers create a most extensive influence, which is subject to great abuse: but that was a matter for the consideration of those who made the law, and must have no weight with the judge who expounds it. The truth is, that, among the many evils of war, it is not the least, to a people who wish to preserve their freedom, that, from necessity, the hands of the executive power must be made strong, or the safety of the nation will be endangered.

But, it may be asked, what is the use of the provision in the second section, concerning courts and judges, if the regulations

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of the president may be executed, without resorting to them? The answer is, that the use is great. In the first place, where the marshal is ordered to make the removal, he is at liberty to apply to the judges; and there may arise cases, in which he will find it prudent to strengthen himself by the judicial authority. But besides, many regulations may be made, which contain no order for the marshal to act, or which may direct him to proceed by way of complaint to the judges. If the regulation in question had simply been, that alien enemies should retire to a place to be appointed by the marshal, any citizen might have complained of an alien enemy, who declined to comply; and a judge might have made and enforced an order for his removal. There may be various regulations for the general conduct of alien enemies, without pointing out the mode of carrying them into effect: and in all such cases, the courts may take cognizance of them. There may be regulations, which barely order that certain things shall be done, or shall not be done, without defining the penalty in case of disobedience. In such cases, the judges to whom complaint is made are vested with a considerable discretion. They may, according to the nature of the case, either direct the alien enemy to be removed out of the *United States*, or to give security for his good behaviour, or to be imprisoned, until the order of the president is complied with. It would be a waste of time to point out all the uses of this provision, respecting the power of courts and judges. To those, who reflect on the subject, many more than I have mentioned, will suggest themselves. It is worthy of remark, that in the third section of the act, it appears, that the president may, by his warrant, directed to the marshal, order him to apprehend any alien enemy, and remove him out of the territory of the *United States*. Now, it is difficult to conceive a reason, why the president should be authorised to remove any alien enemy *out of the country*, without assigning a cause; and yet that he should not be permitted to direct, that those of a certain description should repair to a certain place *within the United States*, and in case of a refusal, that the marshal should remove them. The particular reason assigned by Mr. *Lockington*, for not complying with the order of the president, I cannot but very much regret. But, although it absolves him from the charge of obstinate and perverse disobedience, yet, it can have no effect on my judg-

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ment, as it is a subject on which I have no power to act. I am not without hopes, however, that this public discussion may bring to the mind both of our own and the *British* government, a matter which seems not to have been attended to: that is to say, that persons, detained in a foreign land, cut off from their funds, and without the opportunity of pursuing their usual occupations, may be involved in distress, which demands relief.

But, supposing the president had power to make the regulation under which the marshal has acted, it is denied that he ever did make it. The act of congress requires, that the president should establish regulations, by his proclamation, *or other public act*. He has made no proclamation; but has he not made a *public act?* The first order was issued from the department of state, although it does not appear to be signed by the secretary of state, nor is the name of the president mentioned in it.—The attorney for the *United States* says that the orders of the president are usually communicated in this form. If the matter rested on this notification, I should be somewhat at a loss what to think of it. The president could not transfer his power to the secretary of state; and as there is no mention of his name, some evidence might be necessary, to show that it was really *his* order issued from the department of state. But the order issued from the commissary general of prisoners, puts the matter out of doubt; for the regulations there established which refer to and adopt the former orders from the department of state, are expressly declared to be the act of the president, although they are not signed by him, but by the commissary. This is sufficient to satisfy me. Being published as the orders of the president, signed by an officer of high trust, and never disavowed, I consider them as the *public acts of the president.*

I must add a few words, with respect to the return to this *habeas corpus*. The writ is directed to *Joseph Cornman*, keeper of the debtor's apartment of the prison of the city and county of *Philadelphia*, who made return, that he detained Mr. *Lockington* by virtue of a written order from *John Smith*, Esq., marshal of this district, by which he was commanded to keep the said Mr. *Lockington*, who had violated the orders of the president, &c. until he should be discharged by law. Connected with this return, I must take the suggestion presented by the marshal, and verified by his oath; by which it appears, that he placed

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Mr. Lockington in the debtor's apartment, until he could be conveyed, or would voluntarily go, to *Reading*. The marshal's order to the keeper of the prison has, at first view, somewhat the air of a judicial act, for which he certainly can have no authority. But the peculiar circumstances of the *United States*, with regard to prisons, will serve to explain the matter. They have no prisons of their own, and make use of the state prisons, by permission of the several States. Although the marshal held Mr. *Lockington* in custody, in a ministerial capacity, it might be necessary for him, to give the keeper of the prison some document to authorise his detaining him. So that I consider Mr. *Lockington* as, in fact, in custody of the marshal. Being of opinion that the marshal had a right to take him into custody, and place him in the debtor's apartment for safe keeping, until he could conveniently be removed to *Reading*, I must order, that *Charles Lockington* be remanded to the custody of the keeper of the debtor's apartment.

The prisoner was, accordingly, remanded.

On the 1st of January 1814, the alien, Charles Lockington, having been brought by a new writ of Habeas Corpus before the Supreme Court of Pennsylvania in Bank, on a full argument, by Mr. Dallas, district attorney on the one side, and Messrs. Hare and Condy, on the other, the above decision of the Chief Justice was unanimously confirmed.

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AN

ANSWER

TO

MR. JEFFERSON'S

JUSTIFICATION OF HIS CONDUCT

IN THE CASE OF

THE

NEW ORLEANS BATTURE.

BY EDWARD LIVINGSTON.

Nullæ sunt occultiores Insidiæ, quam quæ latent in simulatione officii, aut in aliquo necessitudinis nomine.

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without waiting for a report of commissioners, and without giving me any notice - - - - - - - - 241

III. The act, if it comprehends my case, is unconstitutional. 1. It creates a confusion of powers, opposed to the nature and spirit of our government. Effects of such confusion. Exhibited in the present case. Striking application of a passage from Juvenal descriptive of the tyranny exercised at Rome under Tiberius - - - 247

2. Judiciary power vested by our constitution in a series of regular tribunals. Danger of committing it to executive officers. Cabinet council said to have been called by the President, and to have given an unanimous decision in the case. Fact not admitted. Question, however, considered - - - - - - - 250

Cabinet Council not contemplated by the constitution, not even for executive, much less for judicial purposes. Origin of the practice of calling a Cabinet Council. Its tendency and effects. Mr. J. the first, if his allegation be true, who erected it into a Court for the purpose of deciding on the title to the batture, and on the mode of dispossessing its owner. Strong reasons to doubt the fact. If true, however, it is a violation of the constitution, and does not lessen the President's responsibility - - - - - - - - 251

3. The act in question and the practice under it, are violations of the constitution in other points of view. Amendments, art. 7. Territorial ordinance. No man to be deprived of his liberty or property, but by the judgment of his peers, or the law of the land. What is meant by the *law of the land?* Clearly not an arbitrary act either of the legislature or of the executive, or of both. The seizure by force, by either, of what the public chuses to call its own, is such an arbitrary act 257

This principle further explained. If the nation can take forcibly what it calls its own, and at the same time cannot be sued, there is no fence whatever against tyranny. Illustrated by a statement of what took place in my own case. My property seized by force. My fruitless endeavours to obtain a trial of any kind, so that I only should be heard. Attendance on the president. On congress. Solicitations—All in vain. Pathetic description by Spenser of a situation similar to mine. My complaints laughed to scorn, and styled *Jeremiades* by Mr. J. My circular letter to the members of congress, selected as one of the objects of his pleasantry. Discussion of the principle that the state cannot be sued. Recapitulation - - - - - *ibid.*

The true construction of the act of 1807, so well understood at New Orleans, that on the appearance of the president's mandate, the superior court of the territory issued an injunction to prevent its execution. My petition for that injunction, and order thereon - 263

Mr. J. objects to the legality of the proceedings of the superior court of Orleans. 1. Because the United States were not a party to the suit between Gravier and the corporation of New Orleans. 2. Because the court had no jurisdiction of the subject of the suit. 3. Because the process of injunction is a chancery remedy, which they were not authorised to grant - - - - - - 265

1. The United States not a party. Force of the objection granted, if they claimed the batture in their own right and for their own use; but they claimed it as trustees for the corporation of N. Orleans, who were parties to the suit. Proofs of this fact. Their title was also brought forward before the court in bar of the plaintiff's recovery, and on a full hearing judgment was given against it - - 266

2. The court had no legal cognizance of the cause, because the United States cannot be sued in any court without their consent. Answer to this argument anticipated, (p. 257.) The corporation of N. Orleans, by Mr. J's. own acknowledgment, were in possession of the batture, and might legally be sued - - - - - 268

3. The court had no right to issue an *injunction*, to *quiet a possession*, or to try without a jury. These modes of proceeding belong exclusively to a court of chancery, and by the territorial ordinance, the judges of

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the superior court have only *common law* jurisdiction. Answer. This objection is a mere quibble, a play on the words "*common law* and *chancery*." Mr. J. acknowledges that the former do not mean the common law of *England*, but the common law of *Louisiana*, which is the *Roman civil law*. From this law, indeed, the English chancery proceedings have been borrowed, but it is not the less, on that account, the *common* law of the land. *Injunction and quieting of possession*, are among the ordinary forms of proceeding, and have proper Latin names in the civil law. A court may translate technical terms from Latin into English without exceeding its jurisdiction - - 269

Answer to the objection that the Court proceeded without a jury—The judges, says Mr. J., *shuffled themselves in the place of the jury*. False and unjust accusation. Trial by jury unknown to the civil law. Act of congress directing that causes in the Territory of Orleans, shall be tried by a jury, *if either of the parties require it*. The defendants had full opportunity to demand a jury trial, but did not chuse to do it, and why? The president knew all these facts, and yet makes this serious charge in the face of them. Against men of his own appointment. Against men whom he calls respectable, and whom he knows to be so - 273

General recapitulation - - - - - - - 279

Under this view of the case, can the president justify himself by means of the plea of honest error? Answer: No. Because error in judgment does not in general excuse an executive or ministerial officer. It only excuses him when he is directed by law to act according to the result of his own opinion, and when there is no constitutional bar to his being invested with such discretionary power. But neither were the case in this instance, therefore, error in judgment is no excuse for the act complained of. Nor can any bad consequences arise from this responsibility - - - - - - - - 283

But did the president, in this case, really err in judgment? If so, why did he select my *batture* from so many others similarly situated, and equally with mine the property of the United States, and their owners, not like me, in possession by the judgment of a competent court? Nothing peculiar in my title, but what made my case more favourable than that of the other riparian owners. In other respects, their situation, their rights were the same as mine. Probable motives of the late president's conduct. Conclusion - - - - 285

Postscript. Judgment of the District Court of the United States for the state of Louisiana, declaring Mr. J.'s proceeding to have been illegal, and restoring me to the possession of the batture - - 290

Appendix - - - - - - - - - - - - - 291

ERRATA.

Since the last sheet of this number was printed off, the following Errata have been discovered, which are here noticed.

Page 140, *in note*, for *appendix No.* III, read *appendix No.* IV.
169, line 11, for 4 *Inst.* read 2 *Inst.*
Ib. lines 11, 12. for §. *Riparum* 4, read § 4. *Riparum.*
Ib. line 26, for § *Præterea*, 10 *Inst.* read § 20. *Præterea*, 2 *Inst.*
Ib. line 31, for *Demoulin*, read *Dumoulin.*
176, line 34, for *quase* read *quasi.*
247, line 9, for *The government*, read 1. *The government.*
250, line 13, for *But I do not*, read 2. *But I do not.*

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MR. LIVINGSTON'S ANSWER.

WHEN a public functionary abuses his power by any act which bears on the community, his conduct excites attention, provokes popular resentment, and seldom fails to receive the punishment it merits.—Should an individual be chosen for the victim, little sympathy is created for his sufferings, if the interest of all is supposed to be promoted by the ruin of one. The gloss of zeal for the public is therefore always spread over acts of oppression, and the people are sometimes made to consider that as a brilliant exertion of energy in their favour, which, when viewed in its true light, would be found a fatal blow to their rights.

In no government is this effect so easily produced as in a free republic: party spirit, inseparable from its existence, there aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause for acts that would make a tyrant tremble on his throne. This evil must exist in a degree; it is founded in the natural course of human passions—but in a wise and enlightened nation it will be restrained —and the consciousness that it must exist, will make such a people more watchful to prevent its abuse. These reflections occur to one, whose property without trial or any of the forms of law, has been violently seized by the first magistrate of the Union—who has hitherto vainly solicited an inquiry into his title, who has seen the conduct of his oppressor excused or applauded, and who, in the book he is now about to examine, finds an attempt openly to justify that conduct upon principles as dangerous as the act was illegal and unjust.—This book relates to a case which has long been before the public, and purports to be the substance of instructions prepared by Thomas Jefferson, late president of the United States, for his counsel in a suit in-

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stituted by me against him.—After four years* earnest entreaty, I have at length obtained a statement of the reasons which induced him to take those violent and unconstitutional measures of which I have complained.

It would perhaps be deemed unreasonable to quarrel with Mr. Jefferson for the delay, when we reflect how necessary Mr. *Moreau's* Latin and Mr. *Thierry's* Greek, *Poydras's* elegant invective, and his own Anglo Saxon researches were, to excuse an act for which at the time he committed it he had no one plausible reason to allege. Such an act, certainly, is easier to perform than to justify, and Mr. Jefferson has been right in taking four years to consider what excuse he should give to the world for his conduct, and still more so in laying under contribution all writings, all languages, all laws, and in calling to his aid all the popular prejudices which his own conduct had excited against me. He wanted all this and more, to make a decent defence. But it was rather awkward to press into his service facts which it is confessed he did not know at the time, and something worse than awkward to impose on the public, as I shall shew he has, by *false translations* and *garbled testimony*. But we must excuse the late president; "*his wish had rather been for a full investigation of the* MERITS *at the* BAR, *that the public might learn in that way, that their servants had done nothing but what the laws had authorised and required them to do;*" and "PRECLUDED *now from this mode of justification, he adopts that of publishing what was meant originally for the private eye of counsel.*" I give the words of the author here, lest in this extraordinary sentence I should be suspected of having misrepresented or misunderstood him. An individual holding a tract of land under one whose title had been acknowledged and whose possession had been confirmed by a court of competent authority, is violently dispossessed by the orders of the president of the United States, without any of the forms of law and in violation of the most sacred provisions of the constitution; the ruined sufferer seeks redress, first by expostulation;—he offers to submit to the decision of indifferent men, and he is refused;—he offers to abide by the sentence of men chosen by the president, and he is

* See in my correspondence with the attorney general, page 14, the ineffectual entreaties I used to obtain a copy of his opinion and a statement of the reasons on which he acted.

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refused;—he offers in the simplicity of his heart to acquiesce in the opinion even of the president himself—and he is refused. He is not even permitted to exhibit his proofs. Fearing the conviction they would produce, he is told that though the president could take, he cannot restore; that he can injure, but not redress; and that congress alone are competent to grant him relief. To congress, then, he applies;—here the same baleful influence prevails. After two voyages of three thousand miles each, after two years of painful suspense and humiliating solicitation, after an attendance of three sessions, he finds that no means can be devised for his relief, that the friends of that man who "*wishes for a full investigation of the merits at the bar*," defeat every plan for bringing the cause before a court, vote against every law providing for a trial, and effectually, as *they* think and *he* hopes, bar all access to any tribunal where the dreaded merits of the case could be shewn.—Harassed but not dispirited, the injured party, finding that no legislative aid can be expected to restore his property, at length applies by suit for a compensation in damages;—he appeals to the laws of his country, and is willing to abide by the decision of a jury, in a country where long residence, great wealth, the influence which had been created by office, and a coincidence of political opinion gave every advantage to his opponent.—Here then is an opportunity which a man desirous of open investigation will not neglect. The upright officer who has been unjustly accused of oppression, will justify himself to his country, and cover his accuser with confusion. The vigilant guardian of the public rights will defend them before an enlightened tribunal, and expose the rapacity of the intruder. He who "stands conscious and erect" will rejoice in the investigation of his innocence—he will discard every form, and proudly dare his adversary to a discussion of the merits!

But the man I speak of does not do this—the man I speak of did not dare to do this.—He feared the learned integrity of a court;—he feared the honest independence of a jury. He entrenched himself in demurrers, sneaked behind a paltry plea to the jurisdiction, and now publishes to the world, that he is *precluded* from this mode of justification, and that "his wish had been for a full investigation of the MERITS at the BAR."

If such indeed were his wish, why was it not gratified? and by whom was he *precluded* from this favourite mode of defence?

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He does not indeed hazard the direct assertion, that it was the unsolicited act of the court. His plea to the jurisdiction, his demurrers, not to mention an attempt to stifle the suit in its birth, by a rule to find security for costs;—all these would too apparently falsify such an assertion. But though not stated in direct terms, is not the idea strongly conveyed? was it not meant to be thus conveyed? When Mr. Jefferson says that the suit was dismissed on the question of jurisdiction, and that "his wish had rather been for a full investigation of the merits at the bar," what are we to conclude? what, I repeat, did he intend we should conclude, but that the decision of the court was unsolicited and contrary to his wish—and yet, he, the gentleman who tells us this, had put in a plea to the jurisdiction, that is to say, prayed the court *to dismiss the cause without an investigation of the merits.* He did more;—fearing that this question might be decided against him, he put in a demurrer to the declaration, that is to say, he took an exception to its form,* and prayed the court a second time, that on this account also *the cause might be dismissed without an investigation of the merits.* He did not stop here; a third battery was erected,—he pleaded another plea, that he did the act complained of, as president of the United States, and that therefore he ought not to be made liable in his individual capacity; and a third time prayed the court that the cause might be *dismissed without an investigation of the merits.* How Mr. Jefferson can reconcile these pleas with his wish to obtain a hearing on the merits, it is difficult to conceive. The coward, who, on receiving a challenge, resorts to the interposition of a magistrate, might as well bluster about his desire fairly to face his adversary, and complain that he was precluded from giving him satisfaction. Yet this preclusion is stated by Mr. Jefferson as his reason for publishing the work which I am now about to examine. He had many advantages in the execution, and promised himself many more in the effects of this production. The subject had been fully and ably discussed, but the publications on the adverse side were not in many hands. A considerable

* One of the causes set forth for the demurrer is curious. He objects to the declaration, because the plaintiff does not name the servants of the president who committed the trespass, and because they are not *made parties* to the suit: the president of the United States wished the innocent ministers of his illegal acts to be made fellow-sufferers with him, for executing his orders!!

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time had elapsed since the subject engaged the public attention. He had therefore only to arrange the arguments in his favour, to suppress or mutilate the conclusive answers which had been given to them, to collect all the quotations which had been used in the discussion, to give a new dress and the sanction of his name, to the calumnies circulated against his opponent; and he would make a book that should astonish by the polyglot learning of its quotations, amaze by the profundity of its borrowed research, and delight kindred minds by the poignant elegance of its satire. Add to these the advantages of using hearsay testimony, ex parte testimony, interested testimony, his own testimony; of quoting authorities with an *et cetera* for those parts which bear against his positions, of omitting a word in the translation of a deed, and founding a long argument on the false reading thus created; add the facility of gaining over to his party that large portion of mankind, who find it much more convenient to be convinced by the reputation of the author than to examine his work; and above all, the hope that disappointment and despondence might silence his opponent;—and we shall have much better reasons for resorting to a publication of his "instructions to counsel" than the alleged preclusion of a hearing at the bar.—Whatever may have been the causes which produced this work, I rejoice exceedingly in the effect. My wish also had "rather been for a full investigation of the merits at the bar," but an appeal to the public is preferred, and I shall not decline it. Causes of less importance have sometimes excited an interest, not only in the countries where they originated, but abroad. The despotic king of Prussia could not oppress one of his subjects under the forms of law, without exciting the indignation of Europe. Lawyers of the greatest eminence took cognisance of the affair, and the force of public opinion, even in a military monarchy, obliged the prince to do justice to his vassal. Shall I then fear a less beneficial effect, when I can shew that the free citizen of a free country, has been deprived of his property by its first magistrate, without even the forms of law?—I do not fear it. However dull may be the discussion, however laborious the research, it will not deter those who have an interest in inquiring whether their "*servant* has done his duty," or has been guilty of unconstitutional violence.—I invite readers of this description to follow me in the investigation I am about to make.

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So much misrepresentation has been used in the discussion, that it will be necessary to begin with a statement of facts, which shall be as brief as may be consistent with a development of material circumstances.

The Mississippi flows through a country evidently gained from the sea, for about one hundred and fifty miles from its mouth. On the western side, this alluvial country has a much greater extent. As in all lands formed wholly by the deposit of rivers, which overflow, the ground is highest near the bank, and slopes in an inclined plane to the level of the waters which receive those of the river, terminating here at irregular distances, in cypress swamps or *trembling* prairies*. This conformation of the soil is very evident and uniform on the Mississippi. The surface of the water, when it is not swelled by the rains and dissolving snows above, is at New Orleans about nine feet below the natural bank. When swelled to its greatest height, it rises about five feet above the level of this bank, and would of course overflow the whole country, unless dykes, there called *levees*, were raised to confine it. These are about the average measures. There are places in which they vary, where the natural bank is not above five or six feet above the surface at low water, and where, of course, an embankment of nine feet and upwards, is necessary to restrain the water in its swell. Fig. 2, plate 2, represents this natural and artificial bank, with the general section of the shores and adjacent land.

The Mississippi is a deep, rapid, meandering and turbid river. From these characters it results, that where it flows, as it generally does through a light soil, it makes frequent encroachments on the one bank; and wherever the water become stagnant behind a point, or at the edge of an eddy, leaves a deposit on the other. Should this deposit be made in the middle of the river, it forms a sand bank, and when it arises above the surface of the water, at its natural height, an island. But if the deposit be made as it generally is, adjacent to the bank, it then becomes what is called in the country a *batture* or alluvion. These batures, low at first, gradually rise, by successive deposits, above the surface of the water at its *natural* height; and when they are

* Those marshes which have not acquired a sufficient consistency to produce trees, and shake to a considerable distance when trodden on, are in Louisiana called *prairies tremblantes*.

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encreased, so as to leave not more than five or six feet water upon them at the time of the inundation;—that is to say, when they attain the height, or nearly the height of the natural bank, the proprietor of the land in front of which they are formed, generally raises a new embankment or levee, so as to include the soil thus created, and protect it from the inundation. The land thus gained, becomes incorporated with the original plantation; the old embankment is suffered to decay, and the road is generally removed, so as to continue along the course of the new levee. These battures are very common on the banks of the Mississippi; and as the land is valuable, they are very generally reclaimed in the manner I have stated. Plate 1, fig. 1, contains the surveys of several of these inclosures, situated about two leagues below the city, and containing several hundred acres, which have been embanked since the change of government, by the planters whose names are found on the plan; five hundred other instances at least could be given. A still more striking example may be found in the plan of the very lands now in dispute, (plate 2,) where the successive appropriations of the alluvion are laid down, from the first in the year 1726, of which the traces still remain, to those made at the present day. The premises in question are lands of this description, differing in nothing from the other alluvions or battures on the Mississippi, and only rendered remarkable by the illegal attempts which have been made to deprive the proprietor of their enjoyment. It may be proper also to add, that the batture of the suburb St. Mary, as will be seen from an inspection of the plan, is only the lower portion of a very large alluvion formed below the point A; that the eddy by which it has been formed, is occasioned by the projection of that point, and naturally runs to it; and that no works can at all impede or hasten the formation of the alluvion, unless they project further than that point.

From this description, aided by a reference to the plans, a tolerable idea may be formed of the natural features of this country, and of the situation and origin of the particular parcel of land in dispute. The title to it will be better understood by a knowledge of the following facts:

The only lands in the lower part of the province which were capable of cultivation, lie immediately on the river or its

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branches, here called *bayous;* the grants therefore were located in an oblong form, extending generally from ten to twenty arpents (a hundred and eighty feet the arpent) in front, by forty in depth, except in particular situations, in which the nature of the soil induced the grantee to take a greater extent back. The road runs parallel to the river, generally within the embankment, but sometimes upon it. The road, as well as the embankment are made and repaired, at the expense of the proprietor of the land, the whole extent of his front; and severe laws oblige him to the performance of this part of the police.

The expressions used in those grants to designate the boundaries and extent, are generally, I believe I may say universally, so many *acres front*, or *front to the river*, (*tant d'arpents de face*, or *tant d'arpents face au fleuve*, or *sur le fleuve*); and these expressions, when thus unqualified, have, without a single exception, been considered as giving the grantee a boundary on the river.

The land in question is held under one of these grants, and is described as thirty-two arpents *de face sur le fleuve St. Louis;** for though the original patent (here called *concession*) be lost, yet we have a record of this part of its contents in the proceedings hereafter referred to.

This land was acquired by the order of Jesuits in three different purchases: one in the year 1726, from Mr. de Bienville, the governor of the province; another from the same person in the year 1728; and a third in 1743, from a Mr. Breton.

In the year 1763, the order of Jesuits was abolished in France, and all its estates forfeited to the crown. Although the province had then been ceded by France to Spain, yet as the treaty was still secret, and was not executed until six years afterwards, the edict of confiscation took place for the benefit of the crown of France, and under it the estate of the Jesuits at New Orleans was seized. These thirty-two arpents forming a part of it, were divided into six lots, and sold at auction by the same usual description, *so many acres front.* The part of this land adjoining the city, was purchased by persons from whom it passed, by regular conveyance, to Bertrand Gravier, who cultivated it as a plantation. In the year 1788, Bertrand Gravier divided the

* French name for the Mississippi.

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front part, lying within the road, into two ranges of lots; in 1796 he enlarged the plan by adding three other streets in the rear, and at different times sold all the front and some of the rear lots to purchasers.

In these sales he describes the front lots, some of them as "*fronting the levee*," some as fronting the river, *conformable to the plan* which accompanied the deed. In some of them he expressly *conveys the batture* in front of lots sold, reserving, in a few instances, the right to take earth from it for his brick-kiln.

Some of these deeds, conveying parts of the batture, are as early as 1788, and none of them are later than 1794.

In the year 1803, John Gravier (then become the proprietor) made an inclosure of about five hundred feet square on the batture. Prior to this, he does not appear to have interfered with a practice which the citizens of New Orleans had been in, of digging sand and earth from it. That property, however, was now becoming valuable, both from its gradual accession of height and extent, and from the growth of the town in its vicinity. Finding that the city and its inhabitants claimed as a right what he and his ancestors had only suffered from inattention, John Gravier determined to bring the pretensions of the city to a legal test. He commenced a suit for the purpose of being confirmed in his possession, and to prevent the city from troubling him with their groundless claims. This suit was pending for near two years; it was heard at three different times, and at length, by the unanimous opinion of the court, decided in favour of the plaintiff. During all this time, no suggestion was made of any title in the United States. The city alone claimed the right of *servitude** on the land, and (after the suit was commenced) the right of property. Immediately after the judgment it was however discovered by the corporation, that they had been defending a false claim. Their counsel moved for a new trial, on the ground that the title was in the United States. Most of the arguments since addressed to the public to prove this position, were then urged to the court, but without success; the judgment was confirmed and executed in the month of June, 1807.

* *Servitude* in the sense here used, in the civil law, is equivalent to the right of commonage for digging earth at the common law.

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One of Gravier's vendees beginning to improve the property, was for some time impeded by a tumultuous assemblage of people, who, however, did not very long continue to oppose violence to the laws. He was suffered to proceed, and after he had expended upwards of thirteen thousand dollars in improvements, and a much larger sum in new purchases, a mandate arrived from Washington, ordering the marshal of the district to dispossess him by force. When astonishment and incredulity were forced to yield to the certainty of this extraordinary fact, the proprietor presented a petition to the superior court, and prayed their interference to prevent the execution of this illegal order; it was granted, and an injunction was delivered to the marshal, commanding him to desist from the execution of the mandate. This writ was however disregarded; an armed force was collected, and the proprietor was forced to abandon his possession; and from that time to the present, he has been employed in ineffectual attempts to obtain relief.

This is a general sketch as well of the situation of the property, as of the title by which it is held, and of the events which led to the controversy. It is but an outline which will be filled up in discussing the different points made by Mr. Jefferson to justify the conduct which he presumes to call, "Proceedings of the *Government* of the United States."

After some preliminary observations, which shall be noticed under their proper heads, the author enters on his subject. Its first division is an attack on the title of one proprietor in favour of others. This objection was with propriety raised on the trial of the cause at New Orleans; though unfounded in fact, it was not there absurd in its application, as it is when used by Mr. Jefferson. The only questions which it imports him to discuss are, Did the land belong to the United States? Had the government a right to seize it? Now whether belonging to Gravier, or sold to the front proprietors, the land was in neither case the property of the United States; and its seizure was equally unjustifiable.

The objection, I have said, was raised on the trial, and the report of the case shews it to have been conclusively answered. Gravier claimed the alluvion, because he was the proprietor to the water's edge; and he claimed to be the proprietor to the water's edge, by virtue of the general expressions, "*face sur le fleuve*,"

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which it is not denied give that extent to all the grants in the country. Having, after a very considerable accretion had been gained by alluvion to his land, sold a line of lots along the road, which I have described as running within the levee, it was contended that because *some* of the deeds for these lots used nearly the same expression, face *au* fleuve, that is *fronting* TO *the river*, not as in ours, fronting *on* the river, a similar construction ought to be given to the expressions in both instruments, and the dilemma which the author urges with so much triumph, was, like most of his arguments, worn out before he took it into his service. The answer to this argument was a concise one. It was, that in the cases where these expressions were used in the deeds of the front proprietors, they were not, as in the case of our grant used alone, that they were restricted by a reference to the plan, and that this plan bounded the lots, not by the river, but by a line drawn across their front on the street; and an uncontrovertible text of law was cited to shew, that wherever such a boundary line existed between the land and the river, the proprietor of the lot could not claim the alluvion, for the plain reason, that he was not the proprietor to the water's edge, and that therefore, what was added by the water was not added to his land, but to the land which lay between his front boundary and the river. This explanation the late president of the United States does not like; it is compendious, he says, but not clear; it wants explanation, and, to use his own phrase, he "spreads it open" for examination; he selects one of the deeds, that to Nicholas Gravier. It conveys two parcels of lots, one of thirteen, *fronting the river*, and another of forty-five, in the rear, by other boundaries, "*in conformity to the plan.*" Then follows a page of reasoning to shew, that the words, *in conformity to the plan*, do not relate to the thirteen lots in the front, but to the forty-five in the rear; and on what, reader, do you think this reasoning is founded? Would you believe it?—on the omission of a troublesome word. The original is explicit; after describing both parcels of lots, it says, "THE WHOLE (*todo*) in conformity with the plan; which having been drawn by Don C. L. Trudeau, I have delivered to the purchaser," &c. It must be confessed, that for a man who wanted to shew that the reference to the plan was applicable only to a part of the lots, this expression, "THE WHOLE," "ALL," was the most embarrassing that could be

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devised. What was to be done? Preserve it in the original Spanish, which not one in a thousand of his readers can understand; omit it in the translation, which every body will suppose accurate in so learned a work; and then argue from the omission, that the reference to the plan related to back lots only.* Of some of my reasoning the late president says, "that it is impossible to characterise it respectfully." What shall we say to this specimen of his own?

The whole argument on this head is of a piece. The sale to N. Gravier is selected, as if those to all the other proprietors contained the same expressions; whereas, a very great proportion refer for their front, not to the *river*, but to the levee; (*haciendo frente a la levee de este rio*) and among these is the deed to Mr. Poydras, who, in one of his publications, has the effrontery to say, "My deed of conveyance expressly contains these terms, *fronting the river*, without any reservation."

In several others the batture is *expressly granted*, and I have purchased from the grantees. I have paid ten thousand seven hundred dollars for parts of it, which were thus sold; and yet this, as well as the other, has been taken as the demesne of the United States. Now Mr. Jefferson (to return him his dilemma) either knew that this description, contained in the deed to N. Gravier, was not that used in the others, or he did not know it; if he knew it, he is unpardonable in concealing from the public, to whom he affects to make a candid appeal, so material a difference. If he did not know it, he confesses that he has deprived a citizen of his property, without being acquainted with the nature of his title. He must take one of these consequences, or he must acknowledge that the circumstance is totally immaterial to the issue. If material, the whole evidence ought to have been offered;—if immaterial, no part of it.

I think I may therefore dismiss this first head of justification, and that I may, without flattering myself, believe that I have shewn it both immaterial to the defence of the late president, and destitute of any foundation if material;—I have shewn that none of those front proprietors can be considered as owners of the alluvion, because their deeds refer to the plan, which does not carry them to the river; because very many of them refer not to the river, but to the levee, as their front exposure; and because those

* See Jefferson, p. 7

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who have an express conveyance, (except one) have disposed of their right, by sale, to the present claimant; and in all events, if theirs, it ought, as their property, to have been as sacred as if mine.

Having thus secured the rights of the front proprietors, this provident magistrate next takes the co-heirs of John Gravier under his paternal care. He has discovered that John Gravier (in fraud of his brothers and sisters, as he charitably insinuates) procured the property of his deceased brother to be adjudged to him; that this batture was not comprised in the adjudication, and that it therefore remains the property of the heirs.—And what then, sir? Why if this statement be true, J. Gravier as one of the three heirs would have a right to convey his undivided third; but surely it gives none to you to take it away from his grantee or from the co-heirs in France.—As however, I know it must give great satisfaction to a mind so feelingly alive to the interest of absentees, to know that they are not dissatisfied with the transaction, I have the pleasure to inform you, that they have ratified their brother's sale of the batture, and that their concerns need no longer occupy your attention. Mr. Jefferson however, when he wrote his book, did not know this circumstance. Let us do him justice and attend to his reasoning from the facts before him.—On the death of Bertrand Gravier, an inventory was taken, according to the terms of it, "of *all the effects and property* of the deceased."—At the time of his death he owned the plantation in question, excepting such lots as had been sold. The plantation therefore as it stood, after deducting the quantity sold, was to be put in the inventory, and it there stands thus: "Item, are placed in the inventory, *the lands of this habitation** whose extent cannot be calculated on account of his having *sold many lots*, but Mr. N. Gravier informs us that its bounds go to the forks of the Bayou."—After the inventory was complete, appraisers were appointed to estimate its value; and in their appraisement the plantation stands thus:

"Item, about thirteen acres of land, *at which the habitation* is estimated including the garden, of which the most useful part is taken off in the front; the *residue* consisting of the lowest part which is enclosed in very bad fences, the side being sold to Don J. Navarro, one Percy, and the negro Zamba; a portion of the

* *Habitation* in the provincial language is synonimous with *plantation*.

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best of which acres with twelve negro cabins, the appraisers estimate at one hundred and ninety dollars the front acre, with all the depth, which makes two thousand four hundred and seventy dollars."

After these preparatory steps follows the adjudication, which is in these words:

"Having seen the proceedings, and in consideration of the consent of J. P. Guinault, defender of the absent heirs, the effects, real estate, moveables and slaves, WHICH HAVE BEEN INVENTORIED as belonging to the estate of his deceased brother Bertrand Gravier, who died intestate, are adjudged to John Gravier at the price of the estimation."

After this adjudication John Gravier was put in possession (as appears by the record) of all the effects and property belonging to the succession of Bertrand Gravier, according to the *inventory*.

Now what appears to have been adjudged to John Gravier by these documents? All the estate of his brother which was put into the inventory. What was put in the inventory?—the plantation, deducting the lots which were sold.—If the batture was a part of the plantation of B. Gravier, and if at the time of his death it was not sold, it belonged to John Gravier by the adjudication. But it ought to have been particularly specified in the inventory under penalty of confiscation.—It was just as necessary to insert the cypress-swamp, the wood, the meadow, and the rice field, as the batture; they were all equally parts of the plantation or farm, and though there are more than five hundred battures in the country, yet not in a single instance have any of them been inventoried separately from the farm to which they belong. The remainder of the plantation after deducting the lots sold, being then adjudged to Gravier, he was as much entitled to it under this conveyance, as to any other acre of land which it contained. But whether purchased by John Gravier or not, he had a right to sell his own third, and the co-heirs by their ratification have confirmed the sale for the residue. So that this objection is at rest, and we are now prepared to accompany Mr. Jefferson in his attempt to shew, not that the property belongs to another, but that it does belong to the United States, and that he had a right forcibly to seize it. But we are not so soon to be gratified; more prejudices are to be excited against the in-

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jured proprietor;—another attempt is to be made, to show that his title is defective,—as if changing the party injured would lessen the offence. The title of Mr. Delabigarre, under which I claim a part of the lands, is said to be illegal, and of course, I suppose, void. But if so, does it vest any title in the United States; admitting that he were guilty of champerty, no new title would thereby accrue to them. The parties might be punishable, the deed might perhaps be declared void, but the United States acquire no rights which they had not before. Why then is the subject introduced? Because, in a bad cause, it is easier to address the passions and prejudices of men, than to consult their reason, or convince their understanding;—because it was supposed that the name of Mr. Jefferson would give new currency to the forgotten calumnies of New Orleans; and because some men can never forgive those whom they have injured.

The repetition of this charge might be excused, if it had not before been repeatedly resorted to—if Mr. Jefferson had not seen the refutation, and if he had not the evidence of the falsity of the charge before him.

It is begun by an allegation (page 11), "that for six years after his purchase, J. Gravier never manifested a symptom of ownership until Mr. Livingston's arrival from New-York;" and that then Gravier received his inspirations that the beach (as he chooses to call it) was his; that I tempted him to lend his name to the suit, but really prosecuted it for my own benefit. This charge is made with an air of levity, and a wretched attempt at wit, which could proceed from no one but a man hardened by repeated attacks on his own character, into a total insensibility for that of others. *I first gave the idea to Gravier, that the property was his!*—yet ten years before my arrival, his brother had, by four several recorded deeds, disposed of different parcels of it;—and Mr. Jefferson, who makes the charge, knew this fact. *I first stirred up a dormant claim!*—yet I did not arrive until the 7th day of February; and in December preceding, a square of five hundred feet was begun to be *inclosed* with a levée and ditch,* and Mr. Jefferson had evidence of the fact. *I first gave Gravier an idea of his claim!*—and yet previous to my purchase, he had agreed to sell it to Mr. Clark and Mr.

* See Appendix, No. P.

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Morgan: and Mr. Jefferson had this evidence of the fact, that I had published it at the place where both those gentlemen live, and that it was never contradicted.* What does he oppose to this mass of proof? Nothing but an assertion, that he "might safely presume that Gravier's work was not begun, while the French governor thought the country belonged to his master," and most probably not until after my arrival. Now, he knew, that I had arrived in February, 1804, and he acknowledges that the inclosure was ordered to be destroyed on the 22d of that month; —so that Mr. Jefferson thinks it probable, that arriving in New Orleans on the 7th day of February, I should immediately find out Gravier, inspire him with so much confidence, as that at my persuasion, he should set up a most unfounded claim; proceed to assert it, by making at a great expense, a ditch and embankment round a square of five hundred feet, that is to say, two thousand feet of levée; and that this plan should be formed by a perfect stranger in the country, communicated to a man he had never seen before, and that the whole should be executed in fourteen days from the time that he first touched the shore. This, Mr. J. thinks so probable as to counterbalance oaths, records, and the silent assent of those most conusant of the fact,

* Since writing this passage, I have obtained the following certificate and letter, which place the fact beyond dispute. Mr. Morgan was about that time a judge of the inferior court, and has since for many years been a member of the city council.

"I hereby certify, that I had agreed to purchase, together with Mr. Benjamin Morgan, from John Gravier, the batture in front of the suburb St. Mary, prior to the purchase thereof by Peter Delabigarre, in the year 1804. That we had agreed on the price (ten thousand dollars), but that the bargain was not carried into execution, as Gravier had during my absence from the city, sold to Mr. Delabigarre.

December 17, 1812. (Signed) DANIEL CLARK.

New-Orleans, March 2d, 1804.

DANIEL CLARK, Esq.

SIR,

I expect in your absence to complete the purchase of the strip of land adjoining the river, from the upper line of the city to the street, passing by Girod's estate in the suburb, and I pray you to give me written directions where to receive money for your half of the first payment.

I am respectfully,

Yours, &c.

(Signed) BENJ. MORGAN.

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and most interested in contradicting it; and thus he uses the influence of his late exalted station, to perpetuate refuted calumnies, and stigmatize the character of a man, whose fortune he had wantonly ruined.

The contract between Mr. Delabigarre and Gravier, is next the subject of attack. It is called *ostensible* only, and the purchase made by it, *a pretended one;* and the reasons given for it are, that Gravier commenced a suit in his own name; that he afterwards made another deed, without any reference to the first; and that in the second deed there was a covenant, that if the suit should fail, the sale should be void. This clause, Mr. J. supposes criminal, both by the common and civil code, and that by the laws of the territory both deeds were void.

Of the first contract I was conusant; it was made by my advice, and immediately after it was concluded, I took an interest of one half in the purchase. If there be, therefore, any impropriety in the transaction, I must bear my share of the odium. Of the second, I was ignorant, until sometime after it was made, and the proof that I was so, is on the records of the superior court; for as soon as I discovered it, I thought it injurious to my interest, and commenced a suit against Mr. Delabigarre, to procure a title for my half of the first purchase.

But though I had a concern only in the first contract, I think both of them free from the stigma which is endeavoured to be attached to them.

Neither of these contracts was valid as a definitive sale, by the laws of the territory: Mr. J. has truly remarked, that by an edict promulgated by governor Unzaga, no lands could pass without an act before a notary; but though not good as deeds, they were valid as contracts, and on performing the conditions, the purchaser might enforce a specific performance, if in the mean time, the seller had not conveyed them by a notarial act to another. They formed, what in the French jurisprudence is called the beginning of proof in writing, which was admitted as introductory of other evidence, to prove the right, and is analogous to the equitable title of the English law. This accounts for the suit being brought in Gravier's name, and not in that of the purchaser. No suit could have been sustained in Delabigarre's name, for his title was not complete. The property remained legally vested in Gravier, though Delabigarre

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might, on payment of the money, force him to convey. Therefore, no one but Gravier could sue.

But why was not the deed made in legal form? Why take a private deed, when a public act was necessary to convey the property? The reason is obvious: the owner would give no other. Mr. Delabigarre had not been two months in the country at the time of the purchase; his resources were unknown; it was therefore thought most prudent by Gravier, to make no definitive sale until one of the payments should be made. It is, I believe, no uncommon transaction in this or any other part of the United States, to make covenants for giving a title, on the payment of the price or a part of it; and this, though in terms a sale, yet legally amounted to nothing more. A conclusive proof that neither concealment nor impropriety was intended, is, that the transaction is stated by Gravier, in his petition against the corporation, wherein after alleging the disturbances of which he complains, he says "by reason whereof persons who have *contracted for the purchase* of parts of this land, refuse to pay." And this petition I drew, and signed as his counsel. Now it is inconceivable, that a man of common prudence, directed by a counsellor of common skill, would, if they were conscious of illegality or crime, furnish the evidence of it on record; and still more inconceivable, that the court to whom the petition was addressed, should not immediately punish so open a violation of the laws.

But there was no illegality. Neither the statute of Henry 8., to which Mr. J. refers, nor the text of the Roman law, forbid the purchase of any land of which the seller is in possession, although it should be known there are adverse claims. If it were so, it would be an offence to buy lands in a very great proportion of the state of North-Carolina, on account of lord Grenville's claim; in the Mississippi territory, on account of the English grants; in Kentucky, where, as I am informed, two, three, and sometimes four patents have issued under the state of Virginia, for the same land; and in every part of the state of Louisiana, where the titles are unconfirmed by congress. If this monstrous doctrine were true, every purchaser of a farm would be guilty of this crime, if the boundary between him and his neighbours was unsettled, although the person from whom he bought were in possession.

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But what possession is necessary to justify a purchase? Clearly such a one as consists with the nature of the property sold; if of a house or other improved estate, actual occupation, or receipt of the rents and profits; but if uncultivated lands, nothing is required but that there be an ostensible title, and no acknowledged adverse possession. How often do we find the opposite claimants of tracts of uncultivated land selling their titles by regular conveyances without having ever seen the estate. Yet, who ever heard of a prosecution under this or a similar statute in such a case?

The proprietor of a farm, with a private road running through it, sells the soil of the road, and opens another equally convenient for those who have the right of way. He has never had any other possession of the road than that which all his neighbours have had, yet it is not selling a pretended title; the soil belongs to him, and he had that constructive possession which alone is consistent with the nature of the property.

To apply this to the present case: the public have a right to the use of the space between the levée and the edge of the water; (although, as will be clearly shewn in the course of this discussion, the soil remains in the proprietor of the adjacent land) until he incloses and protects it from the river;—'till then he has no exclusive right, and can no more interfere with the enjoyment of it by the public, than he could in the case put of the road; but neither in the one case nor in the other does it prevent his selling the property, subject to the right which the public have of enjoying it;—in the case of the road, until an equally convenient one shall be opened;—in the case of the batture, until the land shall be inclosed by a new levée, and when this is done, the right of public enjoyment will be restricted to the space between the new levée and the river.

John Gravier then succeeding, as has been shewn, to all the rights of his brother, the proprietor of the plantation, had a constructive possession of the part of it which lay between the levée and the river, in other words of the batture, he had the *same possession* which every proprietor of land on the river has to that part of it lying outside of the levée, and having this possession might sell it, without being guilty of any offence. The purchaser, it is true, must take it subject to all the legal rights of the public. What these are will be shewn in another part of

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the inquiry;—here the only question is the legality of this purchase.*

But John Gravier had more than the constructive;—he had of a great part the *actual exclusive* possession, and was busied in the exercise of that right which the other proprietors had of advancing their levées nearer to the river. His ancestor had by public recorded acts, sold parcels of this very property to individuals ten years before. The purchaser, therefore, had a fair right to consider him as the true proprietor, even if he had notice of the claims of the corporation of New Orleans. As to those of the United States, no one ever heard of them until after the decision of the suit,—and surely a sale in opposition to the claim of the city only, could not be called the sale of a pretended title, when that very claim is acknowledged by the parties who set it up, to have been a groundless one, by the repeated resolutions they have since passed declaring the title to be in the United States, and not as they contended on the trial, in the city.

The nature of the claim set up by the city, even if a suit had been pending relative to it, would not have rendered the sale illegal. It was the claim of a servitude or right of common, as we should call it in English, to dig sand and lay wood, &c. on the premises. The land might certainly be sold with the risk of this claim pending over it,—or the vendor might take the risk upon himself, and if it were established, might lawfully agree to rescind the sale.

The first agreement for a sale, it will be recollected, is for only two thirds of the land, and contains no other condition than that of paying the money on the part of the purchaser, and that of warranty on the part of the seller. The second is dated nearly two years after, and is for a larger portion of land, including the first. It contains other covenants, and the circumstances which had occurred, rendered them not only legal but

* Conformably to this reasoning is the text of the civil law. *Rectè dicimus eum fundum* TOTUM *nostrum esse etiam cum usufructus alienus est: cum usus-fructus non dominii pars, sed servitutis sit: ut via, et iter.* Dig. 50. 16. 25.—Now if the *totum fundum* as the text expresses it, be mine, although another have the *usufruct* or a right of way over it, surely I may dispose of this which is so emphatically termed *all mine*, and *a fortiori*, I may dispose of it when the usufruct, or the servitude is only claimed, but does not exist in reality.

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prudent. The suit had since been commenced, it had been long protracted; if the corporation established the servitude or right of digging for which they contended, the land would be nearly useless to the purchaser. He had, therefore, a right to guar against that event, by stipulating, that in case it happened, the deed should be void. But, in fact, this stipulation did no more than the law would have done without it;—if the claim of the corporation had prevailed, the purchaser might by the civil law, either have rescinded the sale, or sought a compensation in damages, at his option;—and surely no covenant can be called criminal, which only enforces an acknowledged principle of law. I had, as I have said, no agency in this second deed, nor any other interest in defending the conduct of those who made it than that which is naturally excited, in hearing the memory of an unfortunate man, treated with unmerited obloquy and concontempt;—a widow* bereft of reason, two infant children (one of them blind) deprived of their bread, are not enough!—the reputation of their father must be wantonly and unjustly destroyed before the vengeance of this just magistrate is complete.—Parties, witnesses,—all who dare to complain of oppression,—or to prove its existence, must be involved in one general proscription, that the public may cease to interest themselves in favour of men who are represented as so unworthy of their sympathy. But the device is too stale to succeed with an enlightened—too odious to be favoured by a generous nation; and the mixture of jocularity and oppression which it exhibits only convinces us, that the most hateful traits in the tyrants of antiquity may sometimes be found united with an affectation of republicanism, and of a regard for the rights of man.

While on this subject, let me assure the public, that Mr. *Parisien*, who is most facetiously called a joiner by trade, and a comedian by profession, and who it is most charitably insinuated, was suborned to bear false witness to a most unimportant fact, was a man while he lived, of respectability and worth.†—

* The proceedings of the late president have actually produced this melancholy effect. The relict of the late Delabigarre is confined in a mad-house;—his two daughters depend on the benevolence of relations.

† It will hardly be believed that this serious charge should be made on hearsay only. Mr. J. never saw the testimony on which he comments with such severity. He has seen only an affidavit of a gentleman who says, that he *was informed* Parisien had given such testimony.

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that Mr. *Sigur*, who is treated with the same levity, is one of the most ancient and respectable inhabitants of the country,—and that proof of these facts will be found in the Appendix.* It is no excuse for Mr. J. that he has heard what he asserts,—he should be certain of its truth before he gives it the sanction of his name.

Having thus, as he supposed, excited a sufficient degree of prejudice against his opponent, Mr. Jefferson ventures, but by cautious approaches, on something like a justification of himself.—We are first told that the judgment of the superior court in the suit with the corporation did not bind the United States;—and a page or two is gravely employed in proving, that none but parties or privies are bound by a judgment. This is undoubtedly true, and if the rage of making Latin quotations had not seized the author, he would without citing the *Codex*, have been content with my acknowledgment of it in my Address, p. 22, where I state that I sent on my *Examination*† with a view to *prevent* the United States from *ordering a suit*. That acknowledgment and this admission, however, are both founded on the supposition, that the claim of the United States is one they have IN THEIR OWN RIGHT and for their OWN USE;—but if, as I have since been convinced, those who made the claim on behalf of the United States, did it only as trustees for the original party in the suit, and for their benefit only,—then, I say, though not nominal parties, they are bound.—Nor shall the party really interested avail itself of a concealment of the trust, in order to procure a double trial on the merits. This subject will be more fully developed in another part of the discussion. I proceed with the pamphlet.—Having established to his own satisfaction, that the United States were not bound by the proceedings in the suit which had been determined, the most natural course to be expected, would be for the president to institute one to which they should be a party; but this was too much in the common line. Mr. Jefferson did not like "playing at *push-pin* with judges and lawyers," as he very elegantly terms it; the forms of law were too slow to satisfy his eager desire to do justice. There had been a commotion among the people,—there had

* See Appendix, No. II.

† *Examination of the title of the United States to the land called the Batture*, published afterwards with my address to the people of the United States, in the year 1808.

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been an open opposition to the execution of the laws;—and he seems to have had a natural sympathy for those who were guilty of it. Profaning the sacred exertions of our first revolutionary patriots by an assimilation with his own agency in this paltry squabble, his imagination took fire at a striking similarity he discovered between the judgment in the case of the batture, and the Massachusetts port bill, between the opening of my canal and the "*occlusion*" of the Boston harbour,—he pants for the wreaths of Hancock, Adams, and Otis,—and he bravely determines to hurl all the vengeance of the government at the unprotected head of an individual, who had nothing for his defence but the feeble barriers of constitution, treaty and laws.

Popularity was to be gained, and of that kind which he loves the most,—the applause of those who were independent enough to resist the decree of a court, and set the authority of law at defiance.

In the pages which contain this part of the defence, we are presented with the circumstances which induced the president to take the measure of ordering me to be dispossessed by the marshal; and among them we find several documents which are dated at New Orleans, only thirteen days before the resolution of the privy council at Washington;—but this is a trifling obstacle to Mr. Jefferson. Let us suppose that he had before him not only all that passed at New Orleans up to the very day of the deliberation at Washington, but all the facts he cites as having taken place for years afterwards. Let him have the advantage of the whole, and see to what it amounts.

The first of these documents are letters from governor Claiborne, and the extracts that are given, furnish the true motives of his conduct. These letters inform him, that Mr. Livingston is disliked by the people, and that the decision of the court is very unpopular;—they seem too, to have given a true statement of some of the outrages that were committed in opposition to that decision. Here, then, was an opportunity not to be lost;—an unpopular man to be oppressed,—a popular claim to be supported,—and opposition to the laws to be rewarded. Governor Claiborne, it is true, had formed no conception of the mode in which this was to be done;—he hints in his letter at an old fashioned idea of "devising some means of arresting the judgment of the territorial court, and bringing the cause before another tribunal;"—but this suggestion did not coincide with the

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ideas of the gentleman to whom it was made;—he is peculiarly unfortunate, although his *wish* is always for an investigation before the tribunals of his country, his *practice* is always to decline their jurisdiction, and he was prevented from following this judicious advice of governor Claiborne, in the same manner that we have seen him "*precluded*" from bringing the merits before the court at Richmond,—by his own act.

But it seems the case was urgent,—my works threatened to drown the city,—its peace could only be preserved by destroying them;—and the land in question was absolutely necessary for the use of the citizens. The president, therefore, was called on to interpose,—and he could not wait for the slow forms of law.—If these things were true, the public are yet to learn by what part of the constitution, the president is vested with the power to abate nuisances of his own authority, or whether the first magistrate of the union, is, *ex officio*, high constable of the city of New Orleans.—If any offence was committed against the police of the city, or of the river, and shores, Mr. Jefferson has shewn, that a remedy was provided by the territorial laws;—he has shewn, that the administration of justice was sufficiently vigilant, for he has recited a presentment against these very works.—Why, then, did he not trust that the people of New Orleans would have good sense enough, not to suffer themselves to be drowned, when they had the means of prevention in their power. If the public functionaries, who cannot, I believe, be taxed with partiality to me, had thought that they could have supported the allegations in the presentment, that presentment would certainly have been prosecuted. More than two months elapsed between the time of finding it, and the execution of the president's order. That presentment could have been brought to trial without delay, and if the facts were proved, the works would have been destroyed as effectually by the judgment of law as by any executive mandate. In that case, however, the court must have made it a part of the judgment, that the nuisance should be abated—an inconvenience which was avoided by the president's order, which only drove *me* from the property. The *nuisance* was suffered to remain, and for several successive years served as a safe harbour to boats, and has saved thousands of dollars to the public,—while a house which was also part of the *nuisance*,—has been usefully occupied as a

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guard-house by the city. If, then, there were this danger of immediate inundation, from the effect of my works, there was no necessity for the interference of the president of the United States;—the great officers of state need not have been called from their respective departments, to deliberate on the weighty concerns of the police of New Orleans,—and the cabinet council of a great nation might, it must be confessed, at that period, have found objects much more worthy their attention. But there was no such danger, and I prove it from data given by the very work that contains the assertion.—The banks of my canal extended from the road 276 feet on the batture. The sides were twenty feet wide, and from four to six feet high. Now, if I calculate right, this forms a mass of 55,200 cubic feet, which would be displaced even if the river rose to the full height of the bank by the sides of the canal;—add the parts of the levée laid down on Mr. Jefferson's plan 990 feet long, by 6 feet high and 6 feet wide, forming 35,640 cubic feet, and we have altogether 90,840 cubic feet;—and the displacing this mass, Mr. J. thought put the city in such immediate a danger of inundation, that he states it as a reason for considering the case as one of extreme urgency. But we have seen that the works occupied a space of 90,840 cubic feet;—now, the river being 3600 feet wide, the length of the works 1066 feet, and the rise of the water 14 feet, we have for the increased column of water when at its highest opposite those works, $3600 \times 1066 \times 14 =$ 53,726,400 feet, which being divided by the mass of the work, to wit, 90,840, we have, leaving out fractions, 591; that is to say, that the works displace a quantity of water equal to $\frac{1}{591}$ part of the column opposite to them;—and of course, could only raise the water in that proportion, that is to say, two lines and $\frac{498}{591}$ parts of a line.

This calculation is made on the idea, that the works were erected in the current of the river, but the reverse is the fact. From the point A, to the lower part of the town, (see plate No. 3), there is no current whatever but an eddy, and therefore no work but such as project further into the river than that point can at all change the current. But let us examine by what process of calculation Mr. Jefferson draws the conclusion, that these works would "raise the water three feet at least, and would sweep away the whole levée, the city it now protects,

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and inundate all the lower country." (Jeff. p. 20.) In the first place, he encreases the projection of my embankment from two hundred and seventy six feet, as he states it in the preceding page, to two hundred and fifty yards. Then he says, the river being twelve hundred yards wide, this forms nearly one fourth of this width, and as the river rises twelve feet, when it has its whole breadth, if you reduce it one fourth, the water must rise in the same proportion; but three feet is to twelve feet what two hundred and fifty yards is to the whole breadth of the river; therefore the water will rise three feet,—*which was to be demonstrated.* It must be confessed that this is most admirably calculated. It is a pity to spoil so fine a piece of demonstration; but there are a few corrections which must be made, both to the proposition and the proof.

First, we must in point of fact reduce the two hundred and fifty yards to two hundred and seventy-six feet, which, instead of a fourth of the breadth of the river, is, according to his calculation, not quite one twelfth. Then instead of three feet, I should overflow the levee but one foot, which, by the preceding calculation, must be reduced to a little more than two lines; and in order to effect even this, I must deprive the water of its fluidity, or else, according to the usual course of things, it would, after passing the end of my canal, spread itself over its usual surface; for the plan exhibited by Mr. Jefferson, shews that my lower levee was not connected with the sides of the canal; unless therefore he could contrive to heap the mass of water, displaced by my works, on the surface of the river, and retain it there, he can never make it rise even to the fractional part of an inch, as I have shewn; and this even if the works were erected in the current. But Mr. Jefferson's manuscript affidavits, which he cites so frequently, if they say any thing on the subject, must say what I have before asserted, that the whole of that part of the batture which is inundated is in an eddy, and that consequently the current is no wise affected by any thing that is done there. The calculations, then, are as erroneous, as the facts which he assumes are unfounded. The batture was formed long before my works, or any others, were thought of in that place. Its progress has neither been hastened nor retarded by any thing that has been erected there. The puny works of man can neither arrest nor hasten the progress of those

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changes which are produced by natural causes, impelling this mighty mass of waters. An attentive observer may perceive these causes, but as yet no human effort has been able to prevent their effects. The river, on an average, is twenty fathoms deep. The weight of this prodigious column of water, borne with a current of three miles an hour against a loose soil, undermines it at a depth which no piles can reach; and whole fields are sometimes precipitated at once into this abyss. When these excavations take place on a point, the batture formed by the eddy below it, becomes itself exposed to the depredations of the current.* In the mean time new eddies are formed; they become the agents of new deposits, and places which only a few years before were covered with twenty fathoms of water, begin to shew their heads above the stream. Until therefore some such change shall happen in the current of the river, above the town, as shall throw its force upon the batture of the suburb St. Mary, it will go on increasing in length down the river opposite the town, and in breadth towards the other shore. This progress was foreseen by Mr. Lafon, an engineer of great professional skill, in the year 1804, three years before my works were begun. The city council, alarmed by the progress which the river then made in undermining the levee a little above the government house, in the centre of the city, requested Mr. Lafon to devise some plan for defending it. He made them a very able report, which I am sorry the limits of my work will not permit me to insert, in which he tells them, that any work will be expensive and useless; that, by the natural progress of the river eating out the opposite bank, and filling up the one above the town, the batture of the suburb St. Mary will extend itself opposite the city, and that the course of the current will then strike below the town. This has exactly happened, and the effect which Mr. Jefferson and his manuscript affidavits ascribe to my levee, is found to be produced from natural causes, foreseen and predicted three years before my works were begun; and there was no danger of any of those dreadful consequences which Mr. Jef-

* The batture in question bears unquestionable proof, in its physical conformation, of having undergone the change here described. In digging my canal, the stumps of a grove of large trees, three feet in diameter, were found in their natural position, rooted in the ground, twelve feet below the surface.

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ferson has conjured up to justify his oppression. There was not, I affirm, even any inconvenience to be apprehended; on the contrary, I am ready to prove, whenever an opportunity is given me, that the beauty of the city, and the health, convenience and commerce of its inhabitants would have been greatly encreased if I had completed my plan; and, in the mean time, I offer the certificates of the harbour-master, the wardens of the port, the commander of the naval force of the United States on this station, and all the masters of the vessels in port at the time it was taken; all these speak a language which shews the nature of the information on which the late president acted, and must convince the world, that even the pretence of public inconvenience was wanting, to justify the flagrant outrage.* But it seems the peace of the city could not be otherwise preserved. Mr. Jefferson says, page 20, that he was "*urged* by the repeated calls of the governor, who declared he could not be responsible for the peace or preservation of the place, by the tumults and confusion in which the city was held." We must remark that we are not favoured here, as in the former page, with an extract of these *repeated* calls; it is given as the substance of sundry letters. I wish they had been produced, because I cannot well conceive that governor Claiborne, after having on the sixteenth of September declared that every thing was quiet, and when in fact every thing was so, should write, that he could not answer for the *peace* or even the *preservation* of the place—that he should talk of *tumult* and *confusion*, after he had told us, that every thing was in a state of tranquillity; and that he should urge the president to take violent measures, when his other letters, during the continuance of the tumult, only advise a revision of the sentence in some other tribunal.

These dangers, however, (whether real or imaginary the reader may now judge), were sufficient in the president's opinion to justify the calling of a cabinet council, and we are now prepared to examine with due respect their important deliberations.

We are first told: "They took such views of the whole case, as the state of their information then presented." This I understand; but when Mr. Jefferson tells us in the next sentence that

* See Appendix, No. 3.

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he will "develop *them* (that is the views) *in all the fulness of the facts then known*," I confess I am utterly at a loss to discover his meaning. What we are to understand by "*developing views in all the fulness of facts*" either known or unknown, I confess passes my comprehension; but when he adds "*and of those which have since corroborated them*," I begin to discover that this is a phrase purposely rendered obscure, that "seeing we might not perceive, and hearing we might not understand."—The council had but very scanty materials for this important proceeding.—It would not do therefore to give a simple sketch of their views, from the proofs *then* before them; four years were to be employed in fostering prejudices, in collecting calumnies, in making *faithful* translations and *learned* extracts, in procuring affidavits, and in all the other *honourable* means I have detected, in order to bolster up this weak, wicked, and unconstitutional measure. And they were to be introduced by an obscure phrase, which would lead cursory readers to believe that the cabinet had all those arguments, facts and laws before them, at the time of their deliberation.

Let us give them the advantage of all that the diligence, ingenuity, and influence of the late president has heaped together, for their support, and see on what grounds the determination stands.

The preliminary decision, that the question was to be determined by the French not by the Spanish laws, was erroneous; but, as both codes are equally favourable to my argument, I should spend no time in refuting it, if it were not to shew, that by a kind of fatality attached to this proceeding, it was conceived in false principles, aud has through every stage been marked with error.

The principle that the laws of a ceded country do not change by the mere effect of the transfer, is true as to those laws which affect the inhabitants in their relations to each other; but is it so with respect to those fundamental principles which regulate the prerogative of the sovereign, and the right of the subject? It appears to me they must of necessity be changed by a cession;—that, for instance, which was made of the province of Louisiana, absolved the inhabitants from the duty of allegiance which they owed to France, and made them, by the very act, subjects of the crown of Spain. The same relation was created

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between them and their new sovereign, which subsisted between him and his other subjects. If that relation gave rights to the new sovereign which were not due to the old, the people were bound to submit; on the contrary, if the people to which they then became united had greater privileges, these were immediately communicated to them, and the new sovereign could not, without injuring the fundamental laws of the kingdom, attach to himself greater prerogatives in this, than he had in his other colonies; and even if the right of alluvion were inherent in the crown of France, it may reasonably be doubted whether that right passed by the transfer of the province to the king of Spain. If a province of France should have been, under the old monarchy, ceded to Spain, so as to be incorporated with that kingdom, I am inclined to think that the *droit d'aubaine*, and other local rights of the crown, would not by the very act of transfer be vested in the king of Spain.—I do not urge this argument as conclusive, but I think it has some weight, and deserves abstractedly more development than its importance in this inquiry will excuse.

But whatever may be thought of these principles, there is another more generally acknowledged, which applies directly to the case;—it is, that the ancient laws of a ceded country are in force, only until the new sovereign shall direct them to be changed.* This principle is not denied in the work to which I reply, but we are told that the sovereign never made such an expression of his will in Louisiana, and the very instruments, on which I might rely (even without other proof) to evince the change, are cited to shew that there was none.

O'Reilly's proclamation in 1769, it is acknowledged, changes the *form of government*. This, it is said, might be done while the system of law remained; this is true, but what do we do with the remainder of the sentence? It is not only the form of political government (Jeff. p. 22) but the "*administration of justice* prescribed by the wise laws of Spain," which are declared to be introduced. The proclamation details the new offices and the duties of the officers, and it is accompanied by *instructions* "for the instituting and carrying on civil and criminal suits, and rendering ordinary judgments conformably to the *Recopi-*

* 1 Blackstone's Com. p. 107.

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lacion, (or *Digest* of the laws) *of Castile and of the Indies*, for the government of the judges and parties, until the Spanish language shall be more familiar, and a more extensive knowledge of those laws shall be attained."

This proclamation and the instructions both refer to the laws of Spain as forming the code of the country, the first of these instruments by general words, the second more particularly, to the laws of Castile and the Indies, of which the *instructions* contain such an abstract as was required for daily use.—But neither the proclamation nor the instructions were necessary for the introduction of the Spanish laws. A code had been long prepared for the government of the Spanish colonies in the *Indies*, by which name they designated all their American possessions. It is called the "*Recopilacion de las Leyes de las Indias.*"* It introduces the law of Castile, those of the Partidas, and of Toro; that is to say, the whole body of the laws of Spain, in all cases not provided for by the laws of the Indies,† and declares that the laws of that collection shall prevail in all the Spanish colonies, as well those then established, as those which might in future be discovered or established.

The moment then, that Louisiana became a Spanish province, it was subjected *de jure*, to the system of laws I have described; and *de facto*, none other has had the slightest authority since the transfer. Whence therefore Mr. Jefferson has derived his idea that the French and Spanish laws were confounded in practice, I know not; certain it is, that in all their tribunals none but Spanish laws were cited by the advocates, or admitted by the judges; that the assessors by whose advice all decrees were rendered, were Spanish, not French lawyers; that in their official opinions, they referred only to the laws of Spain and the Indies, as their rule of decision; and that "the changes after 1769, were not, as is supposed, chiefly in the organization of the government, but that they also pervaded the whole system of jurisprudence."

It is admitted that the French laws were in force at the time of the sale of the Jesuits' property; but it is not admitted that, as

* Leyes de Indias, Vol. I. lib. 2. tit. 1, laws 1st and 2d.

† It establishes for the government of all those possessions a royal council called the *Council of the Indies*.

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Mr. Jefferson alleges, the question "*was then generated.*" The *generation* of the question could not have taken place before the property existed. Now there is not the slightest evidence of any increase by alluvion, between the year 1763, the time of the sale of the Jesuits' property, and 1769, the period of the transfer of the province. On the contrary, Mr. Laveau a witness for the city declares "that at the time of the sale of the Jesuits' property, vessels came to the levee, opposite to Madame Delor's,* and that there was then no batture from thence to the city."

Whatever unanimity therefore might have reigned in the cabinet as to the laws they were to be governed by in their ex parte trial of my title, the impartial reader will, I think, perceive at least some doubts as to the correctness of this preliminary decision. These doubts will be increased, when he peruses the report of the attorney general, a member of that cabinet. With a candour which does him honour, he says "the facts from which alone the law can arise, are much controverted. These must be *correctly ascertained* before a *satisfactory opinion* can be formed,"—and again, "All the light afforded by the statements and papers on each side, *was not deemed sufficient* to ascertain with precision the facts. *The law itself which should furnish the rule of determination, was also a matter of controversy;* perhaps it might be considered not improperly as *foreign laws*, and in some degree at least the subject of proof."—Now, if the attorney general in June 1809, thought the facts uncertain, and the law a matter of controversy even after all the light afforded by the statements and publications, it is a little singular, that Mr. Jefferson should tell the world there was but one opinion in the cabinet of which this very attorney general was a member in the year 1807. It is true, the attorney general adds in this report that he adheres to his former opinion. But what was that opinion? Merely, according to his own expression (Correspon. p. 8), a concurrence with Messrs. Derbigny and Gurley, *provided the statement of facts furnished and officially laid before him was correct.*" But it is evident from the parts of the report I have just quoted, that he considers the law of France among those *facts*, since after two years consideration of the subject, he treats it as a foreign law, and calls for further

* Now Duplantier. See plate No. 2.

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proof of its provisions. *He* makes no vain pretence of being deeply versed in a foreign system of laws, to which his studies had not been directed. Fortunate would it have been for me, and honourable to the country, if others had rendered equal justice to their own ability to decide.

Mr. Jefferson, however, had no doubts, and his council, he says, were unanimous. On this co-operation of the council, I shall only make this observation: that in all my inquiries, in all my correspondence on this subject, it was never hinted at; nor had I the slightest suspicion of the fact, until I saw it asserted in the publication before me. The member of that council who told me that the order was given in the execution of a personal duty devolved upon the president, in which he had not participated; that influential member of the cabinet, as well as others implicated in this charge of unanimity, owe it to themselves to deny the imputation. To me it is of little moment with whomsoever the measure originated, or whoever sanctioned it. I am prepared to shew, that it is illegal, unconstitutional and oppressive.

All who have written on this subject in opposition to my claim, have acknowledged that by the laws of Spain, alluvions belong to the proprietors of the adjacent lands. It was necessary therefore to abandon this point, or to find out some system which would vest property of this description in the sovereign power.

The inaccurate expressions of some French jurists, and the grasping provisions of some French edicts, together with the circumstance of this province having once been under the dominion of France, pointed out the jurisprudence of that country, and the laws of France were resorted to; with what success, may be determined by those who will take the trouble of refering to the former discussions of this subject, particularly to the learned arguments of Mr. Duponceau, in two publications, which still remain without refutation.

Having repelled all the skirmishing attacks which have hitherto impeded our progress, we at length approach the body of Mr. Jefferson's defence. It consists of the following points:

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I. *That alluvions of navigable rivers, by the law of France, belong to the king, and that those of the Mississippi have been transferred, with the other sovereign rights, to the United States.*

II. *That the right of alluvion accrues only to rural, not to urban possessions.*

III. *That the property in question is not an alluvion, but part of the bed of the river, which belongs to the sovereign.*

IV. *That the use I made of the property was dangerous to the safety of the city of New Orleans, and an infringement on the public right to navigate the river; that my works were a nuisance, and that the president had a right to abate it.*

In discussing these points, I feel an embarrassment from the reflection, that almost every thing I shall say has been anticipated, either in my own publications, or those of the learned counsellor and excellent friend, whose disinterested zeal has advocated my cause; and I cannot but admire the patient perseverance with which Mr. Jefferson consents to transcribe the oft repeated authorities, to rally the broken sophisms, and once more array in his service the ten times refuted arguments, which, at different periods, have been worn out in his defence. I will not, however, be outdone in the contest. I will revive the charge, as often as he shall choose to repeat the defence; nor will I cease to expose his oppression to the public, until I have an opportunity of arraigning him before another tribunal.

I. Let us begin then with the first ground of defence, that *alluvions of navigable rivers, by the laws of France, belong to the king, and that those of the Mississippi have been transferred with the other rights of sovereignty, to the United States.*

The Roman law, Mr. J. acknowledges, (p. 36) gave alluvions to the adjacent proprietors, as well as the sand-bars, shoals, islands, and even the bed of the river, when deserted; but the *established laws of France*, he contends, differed in all these particulars; and, as usual, Pothier is brought forward to bear the burthen of the contest. He is the only author of any reputation in France, who advances this doctrine; for Guyot, Ferriere, Denizart, and the author of the Title Jurisprudence, in the Encyclopedia, who are quoted by Mr. J. support, as I shall shew most expressly, the right of the adjacent proprietors. If Pothier is to be understood in the sense in which he is quoted, (which I must confess is the most obvious meaning of the passage) he is then contradicted

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by the venerable sages of French jurisprudence who preceded him, and is followed by no one writer of note. This is so extraordinary a circumstance, that I sought, by a reference to the context, to shew that he was guilty of an inaccuracy of expression, rather than an error in principle.* But if my attempt to

* On this passage of Pothier, I made the following observations in my *Examination*, pages 19 and 20: "The only remaining authority is that of Pothier. I "confess that the part cited, would lead the reader to suppose that this "writer meant to decide the question in all cases of navigable rivers; but "a closer attention will perhaps discover an inaccuracy of expression, or an "error, unavoidable, in some instances, even by the most correct writer, "whose attention is turned to so many points as are embraced by the valua-"ble work of Pothier."

"I apprehend that what is laid down here as a general proposition, appli-"cable to all navigable rivers in France, is true as to those only, (and this "may be the case perhaps with the greater number) where the grants have "not been bounded by the river, but by a fixed front boundary. I believe so, "because if the doctrine of Pothier were understood in the unqualified sense "in which it is quoted, the other writers whom I shall cite, and who all, without "exception, give a contrary opinion, would at least notice that of so celebrated "a writer, if they supposed it differed from theirs on so important a point.

"I am also inclined to this solution from the passage which follows, in the "160th article, where he gives the reason why, by the Roman law, the alluvion "belonged to the adjoining proprietors."

"It was (says he) by a kind of right of accession, that, according to the "Roman law, the riparious proprietors had each one in his own right, the "property of the islands which were formed in the river, and even in its bed, "when the river abandoned it to take another course."

"The inheritances of these proprietors having towards the river an unlimit-"ed extent, and having no *other bounds but the river*, and *which comprehended* "*even the shores, and all which was not occupied by the river;* the bed, which had "been covered, when it ceased to occupy it, was deemed to have made a part "of those inheritances, and to be an accession to them. It was the same thing "with respect to the islands which were formed in the river; these islands "being nothing else but a part of the bed of the river, which it had ceased to "occupy."

"By the French laws, the navigable rivers belong to the king; the islands "which are formed within, as well as the bed when it is abandoned to take a "new course, belong to the king; the proprietors of inheritances on the bank, "cannot at all pretend to it, *unless they shew titles of concession from the king.*"

"From these citations I think it appears, that Pothier makes the right of "alluvion to depend on the fact of the concession or grant being bounded by "the river, since he gives the existence of such boundary as a reason why, "under the Roman law, the proprietor was entitled to the alluvion, and de-"clares that unless he has a similar concession, he is not entitled to it by the "French law. I have endeavoured, I know not with what success, to reconcile "Pothier with the other French writers, some prior and others subsequent "to his work: every one of whom, at least all that I have been able to consult,

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reconcile him to the body of the law be unsuccessful, we must not, with Mr. Jefferson, make the law bend to his authority. Let us examine the other writers who are relied on; they are *Guyot*, *Denizart*, *Ferriere* and the *Encyclopedia*. It would have been but candid in Mr. Jefferson, when he cited Guyot, to have told his reader that the same author, whose doctrine, under the word *island*, he quotes, had, under the word *alluvion*, the one now in question, expressly declared, that the "dispositions of the Roman law were observed in France, except on the rivers Doux and la Fère." The whole passage is quoted in my Examination, (p. 21). Mr. J. therefore would have had some better title to the character of a fair disputant, had he adverted to it.

Ferriere and Denizart, on whom he also relies, say no more, even in the passages cited, than that augmentations, *formed suddenly and all at once*, belong to the king; a position I am not interested in denying, and which I had transcribed with the rest of the article, which Mr. J. for good reasons, has not chosen to quote. Denizart is as follows:

DENIZART: *title* ALLUVION. *Vol.* 1, *page* 74.

"I. L'alluvion est un accroissement qui se fait insensible-"ment, et peu à peu, sur les rivages de la mer, des fleuves et des "rivieres, par les terres que l'eau y apporte."

"II. Lorsque par *alluvion*, un héritage se trouve insensible-"ment accru, et plus étendu qu'il ne l'était, l'accroissement ap-"partient au propriétaire, et celui dont l'héritage est diminué "par cette voie, ne peut pas revendiquer ce qui s'en manque."

"Cette maxime, qui est puisée dans le droit Romain, A LIEU "DANS TOUTE LA FRANCE, excepté en *Franche comté*. On y "dit communément au contraire que la riviere du Doux *n'ôte ni* "*ne baille*. Ainsi *l'alluvion* n'est point dans le cours de cette "rivière, un moyen d'acquérir. Voyez la remarque de Du-"moulin."

"Il faut encore excepter la rivière de *Fère*, qui, suivant une "coutume locale d'Auvergne, *n'ôte ni ne baille*, c'est á dire, que "lorsqu'elle prend d'anciennes possessions par inondation ou "autrement, petit à petit, deça ou delà l'eau, il est permis à celui "qui perd de suivre sa possession et de la revendiquer."

"agree in the doctrine, that the proprietors of land bounded by a river, "whether navigable or not, is entitled to all the increase that may be produced "by alluvion; but that *attérissement*, a word peculiar to the French jurispru-"dence, belongs, in navigable rivers, to the king."

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"III. L'augmentation qui arrive dans un héritage par *alluvion*, est une seule et même chose avec l'héritage accru: "(*fundus fundo accrescit, sicut portio portioni;*) il en prend toutes "les qualités accidentelles de fief et de roture, de propre et "d'acquêt; Il est sujet aux mêmes charges, fussent-elles d'usu-"fruit et de substitution."

"IV. Il n'en est pas de même d'un accroissement subit, "occasionné par un débordement, ou par quelqu' autre cas for-"tuit: la portion de ce terrain pourrait en ce cas, être réclamée "par le proprietaire. Voyez la coutume de Bar."

"V. La maxime est d'ailleurs affermie par l'arrêt rendu au "rapport de Mr. l'abbé de Vienne, en la quatrième chambre "des enquêtes, le 15 Avril, 1744, entre le Marquis de Bouzols "et Mr. de Chamflour, conseiller en la cour des aides de Cler-"mont, rapporté par Guyot, Traité des Fiefs, tome 6, chapitre "*des Rivières*, page 673, n. 10; et par arrêt du Mercredi 22 Fe-"vrier, 1769, rendu en la grande chambre, conformément aux "conclusions de Mr. Seguier, avocat général, la même chose "a été jugée. La sentence qui avoit ordonné une visite des "lieux a été infirmée, et il a été ordonné que par enquête re-"spective, il serait verifié si le changement du cours de l'eau, "sur le rivage de la mer, avoit été subit ou insensible. Mr. "Lochard plaidait pour le chapitre de Luçon, et Mr. Caillou "pour le sieur de Champagné."

"VI. Bourjon prétend que ce qui accroît par *alluvion* appar-"tient au seigneur haut justicier; mais ni son opinion, ni l'avis "des auteurs qu' il cite, ne sont suivis dans l'usage. Voyez la cou-"tume de Normandie, art. 195, l'article 268 de celle d' Auxerre, "l'article 154, de celle de Sens, et celle de Metz, tit. 12. art. 28.

"VII. Les *attérissements* formés subitèment dans la mer ou "dans les fleuves et rivières navigables, appartiennent au Roi, "par le seul droit de sa souveraineté. Voyez la déclaration du "mois d'Avril 1683, et Mr. Le Bret, de la souveraineté Liv. 2. "Chap. 16; et les édits des mois de Decembre 1693, et Fev-"rier 1710, concernant les attérissements, isles et islots. On "trouve ces deux édits dans le Recueil de Neron, Tome 2."

Ferriere is not less express. "The disposition of this sec-"tion," (that of the Roman law, Inst. Lib. 2, tit. 1, s. 20, *de alluvione*) "is observed among us."—And the whole passage from the Encyclopedia, of which a shred is given by Mr. J. reads thus:

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"Alluvion is an increase of the ground, which takes place by "slow degrees, on the shores of the sea, on the borders of "*fleuves* and rivers; occasioned by the earth which the water "conveys to it, and which becomes so consolidated with the "contiguous land, that it forms a *whole with it—an identity.* "The name of alluvion is also given to those lands which are "slowly and imperceptibly left uncovered by the water.

"The Roman law places alluvions in the number of the means "of acquiring according to the law of nations, as being a kind "of accession; that augmentation being operated in a slow and "imperceptible manner, remains to the inheritance to which it "is found united.

"The portion which is thus added insensibly, is not consi- "dered as a new land, it is a part of the old which becomes pos- "sessed of the same qualities, and it belongs to the same mas- "ter, *in the same manner as the growth of a tree forms part of "the tree, and is the property of the proprietor of the tree.* "That right of increase by alluvion is grounded in the maxim "of law, which bestows the profits and the advantages of a "thing, to him who is exposed to suffer its damages and its "losses.

"THE REGULATIONS OF THE ROMAN LAW ON ALLUVION, "ARE GENERALLY FOLLOWED IN FRANCE. The *coutumes* of "Metz, Sens, and Auxerre, have on that subject precise regu- "lations, which form their common law.

"But the province of Franche comté must be excepted, where "it is established as a maxim, that the river Doux neither gives "nor takes away;—that is to say, that the person whose inheri- "tance is diminished by the inundation of the river, may in- "demnify himself by possessing himself of the land which it "has abandoned.

"The same thing takes place on the inheritances bordering "on the river Fère, in Auvergne, where the local *coutume* esta- "blishes the same right.

"The alluvions which the sea produces on the lands which it "bathes, also belong as a right of increase, to the proprietors of "those inheritances, who may also make levées or dykes, to "secure them.

"We must observe, however, that to acquire by right of al- "luvion, two conditions are necessary.

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"FIRST.—That the increase should be made slowly and im-"perceptibly, in such a manner that it cannot be discovered in "what time each part of the alluvion has been formed to, and "consolidated with the inheritance.

"SECOND.—That the inheritance by virtue of which the right "of acquiring by alluvion is claimed, be contiguous to the river, "in such a manner that the bed on which it flows, seems as it "were, to be a part of the same inheritance;—for, in case it "did not bound exactly to the river, and it was bounded by a "causeway or by a road, the parts left uncovered by the river "between its bed and the road, cannot belong to the proprietor "of the inheritance situated on the other side of the road. Those "lands belong to the king in navigable rivers, and to the feudal "lords, in those that are not so."

Thus we see, that out of five writers on the French law, cited by the late president, four directly oppose his doctrine, and are made to favour it only by that ingenious and novel device which makes the scriptures declare "*there is no God.*"

After laying before the public, for the second or third time, the whole of these texts, of which partial extracts are given by the gentleman with whom I contend, I pause to ask whether a perusal of the whole does not give a different idea from that conveyed by the extract?—Whether it does not give an opposite idea?—Whether the whole text was not under his eyes when he wrote, and had not been successfully quoted before, to answer and explain the passages he cites?—An affirmative answer (and no other can be given to these queries) must involve Mr. Jefferson in the reproach of endeavouring to deceive the public, by a partial quotation of authorities, a conduct which would not be tolerated by any tribunal, still less by that of the public, to which he has appealed.

Having shewn that all the elementary writers, save one, which have been relied on, prove the reverse of the doctrine for which they were introduced, let us now examine the authority which we are told is to "*put aside all further question, as to the law of France on this subject.*"—The edict of Louis the XIVth, of the 13th of December, 1693.

It is, however, a little extraordinary, that during the century which has elapsed since this *decisive* decree, but one writer of any note in the whole kingdom can be found, whose doubts

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have been "put aside" by its provisions, and that *not one* tribunal has decided in conformity with the construction now put upon it. This edict has been so often pushed forward to bear the brunt of the controversy, that I am tired of referring to it, and shewing that neither its declaratory nor enacting clauses warrant the conclusion drawn from it.

The first rule in construing statutes, is, to examine how the law stood prior to their being made.

The only sources from which we can draw a knowledge of this point, are statutory laws, elementary writers, or decisions of courts.

Positive law is not pretended to exist, or the edict would have been produced instead of the one which is referred to.

The only elementary writers cited, who wrote prior to this edict, declare, that alluvions belong to the adjacent proprietor, though islands and increments formed in the beds of rivers, by sudden changes, belong to the king, and not a single decision either before or since has been discovered vesting them in the sovereign. We may fairly, then, take it for granted, that at the time of the rendering that edict, the fundamental law of France gave alluvions to the proprietors of the land on which they were formed.

Now, let us examine whether this edict either could change or does purport to change this law.

We have seen, that as the law stood before the edict, islands and increments formed in the bed of a river, detached from the shore, belonged to the king; but, that alluvions formed imperceptibly on the bank, belonged to the private proprietor.—Now, if the edict intended to make so serious a change in the laws of the country, it would have been done by express terms, and in the enacting part of the statute. But the statute in question, in its preamble or declaratory part, asserts, that the king has a right of property *on* (*sur*) (which is improperly translated *in*, by Mr. Jefferson) on all navigable rivers and *fleuves* (a term meaning a navigable river falling into the sea, for which we have no equivalent) in the kingdom, and consequently to all the islands, mills, ferries, sudden *accumulations*, (*attérissements*)*

* "Nous appelons attérissement le canal et le lit que la riviere a *tout d'un coup* quitté."

We call *attérissement* the channel and bed which the river hath *all at once* quitted. 2 Ferriere on the Inst. 45.

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and increments formed by the said *fleuves* and rivers.—That this right being *incontestably established* by the laws of the state, as a necessary consequence and dependence of his sovereignty, the kings his predecessors and *himself*, had ordered researches to be made as to the isles and increments formed THEREIN.

In all this, I see nothing but an assertion which I am not interested to deny, that the laws of the land gave *islands* and *attérissements* to the crown, when formed in the channel of navigable rivers. But it is said, p. 33, that the word *accroissement* (increment) is also used—that this is a generic term, of which alluvion is a species, and that therefore the edict comprehends it.

But where there are two species of increment, to the one of which the king has a right, and to the other he has none, would it be a fair construction to say that the use of the generic term would imply an assertion of his right to the whole?

Suppose, for instance, a king of France in some edict relative to the royal residence were to recite that he and the kings his predecessors had an undoubted right to the *Palais* in the city of Paris, could this be fairly construed into a confiscation of all the palaces of the nobility and clergy in the city?—or would it not be restricted by the rules of law as well as common sense, to that species of property which really belonged to the king?—and as the distinction must have been known to the framer of this edict, had he designed to have changed the law, or even to have declared, that every species of this kind of property belonged to him, he would have found some term to have expressed the idea, and would not have left any cavil to his subjects on the occasion; but that he did not intend it, is apparent not only from what I have said, but from the recital that in consequence of this right of property, he and his predecessors had ordered researches to be made, as to the isles and increments formed *therein* (the rivers), that is by *attérissement* in the bed, not by *alluvion* on the bank;—but it may be asked, why employ the word *accroissement* when he had already used the word *attérissement*, if they are synonymous?—but they are not. There are *accroissements* which are neither *attérissements* nor alluvions,—and it is to this species that the ordinance refers, as we learn from the most respectable authority.—" Il y a donc (says

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" Ferriere, p. 52.) de la différence entre l'alluvion et *l'accroisse-*
" *ment* fait par la violence des eaux."—" Par notre droit Fran-
" çais, quand ces accroissements qui se sont faits tout-à-coup
" sont considérables, on prétend qu'ils doivent appartenir au
" roi, comme une espèce d'épave; ce qui paraît conforme aux
" ordonnances royaux, par lesquelles les isles et attérissements
" qui se forment dans les grands fleuves, appartiennent au roi."—
" " There is then a difference between an alluvion and an ac-
" croissement made by the violence of the waters."—" By our
" French law, when these accroissements which have been made
" suddenly are considerable, it is pretended that they ought to
" belong to the king as a kind of waif; which *appears to be con-*
"*formable to the royal ordinances* by which isles and attérisse-
" ments which are formed in navigable rivers belong to the
" king."

Thus every word in the preamble is satisfied without construing the edict so as to make a change in the laws of the kingdom, and an inroad upon private rights. Let us see whether the enacting part of the edict goes further.

For these reasons (says the sovereign), we *enact*—what?—That all alluvions shall hereafter belong to the crown?—that the occupants shall immediately abandon them?—No; but simply, that all the holders, proprietors or possessors of isles, islots, accumulations, increments, *alluvions*, rights of fishery, &c. on navigable rivers, shall be maintained in their possession, on paying one year's revenue, if they have a title prior to the year 1566, or two years' revenue, if they have no title or possession prior to that period.

The same observation may be made as to the body of the edict, which was used with respect to the preamble. There are alluvions to which the king had a right, and there are others to which he had none. Of the first kind were those which were formed upon his property; of the latter those which were annexed to that of his subjects.—The islands in navigable rivers were his; islands more frequently are enlarged by alluvion than lands on the bank, because the current always forms an eddy at the lower end of an island. This alluvion belonged to the king, because it was annexed to, formed a part of his property. When, therefore, he was confirming the title to the possessor of the island, he did it but by halves, if he did not give

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him the alluvion also, and he accordingly does give it. Here we have the true reason why this word is used in the enacting clause,* but omitted in the preamble. He could not in the preamble, declare that he had a right to all alluvions on navigable rivers, because it would not have been consistent with truth;—but he used it in the enacting clause, because it was necessary to assure property of that description to which he had a right, upon the very principles for which I contend, viz.—That alluvions belong to those upon whose lands they are formed.—It is then only by a very forced construction of this edict, that we can with Mr. J. think it so decisive as to *put aside* all doubt, or that it can form even an argument in his favour.

If, however, it should be conceded that the king intended to rob his subjects of property they before had, and to vest it in the crown, it would be a void act; for though the sovereigns of France had much greater and higher prerogatives than those in other more favoured countries,—yet the people did not hold their property solely at the will of the monarch; there were fundamental laws to protect it, which their kings swore to observe;

* In my Examination, p. 10, I say on this subject,

"Because the word alluvion is introduced in the list of property that is confirmed to the proprietors, I do not perceive that he arrogates to himself a right to the alluvions which shall be formed upon the land thus bounded on the river; and I can account for the word being introduced into this part of the edict, by supposing that it was the intent of the king to confirm to possessors of islands, not only the original soil of those islands, but also the increase which they had gained or might thereafter gain by alluvion. This is a very natural construction, not only from the omission of the word in the declaratory part of the edict, but because islands are more frequently increased by alluvions than the banks of the rivers themselves; and thus the words of the edict may be satisfied without making it at war with the fundamental laws of the kingdom." This reasoning Mr. J. either does *not deign* to notice, or *could not* answer, for it is passed over in silence. Having, when I wrote, no authority for my explanation, I should not have had the vanity to attribute his silence to the force of the argument while I thought it only mine; but I have since discovered, that it is supported by such high authority, that I am relieved from the mortification of supposing the argument was not answered, because it was beneath my opponent's notice.

The parliament of Bordeaux, in a remonstrance to which I shall hereafter refer, speaking of this edict, says: "If the edicts of 1693 and 1710, to islands and islots have added the words *alluvions* and *attérissements*, we must understand by this, the alluvions and attérissements formed upon the islands and islots which belong to the public property, *when they are in the channel of the river.*"

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—there were privileges and franchises which they were bound to respect. Every province had its code, which was secured by the several treaties which annexed them to the crown. For instance, by the treaty of the 12th of June 1451, by which Guienne was annexed to the crown, Charles the VIIth, stipulated as follows:—"Et fera le roi à l'entrée de la dite ville de "Bordeaux, au jour dessus dit, s'il y est présent, ou mon dit "seigneur le comte de Dunois, pour lui, si le roi n'y peut être, "le serment sur le livre et sur la croix, ainsi qu'il est accou- "tumé, de tenir et maintenir les habitans d'icelle ville et du "pays, et chacun d'eux présents et absents qui demeureront ou "demeurer viendront en son obéissance, en leurs franchises, "privilèges, libertés, statuts, loix, coutumes, establissements, "styles, observations et usances du pays de Bordeaux en Bor- "delois, de Bazas en Bazadois, et d'Agen en Agenois."

"And the king on his entry into the said town of Bordeaux, "if he be personally present, or the said lord the count de "Dunois, on his behalf, if the king cannot be there, shall swear "on the book and the cross, in the usual manner, to keep and "maintain the inhabitants of the said city and country, and each "of them present and absent who shall reside or come to reside "under his allegiance, in their franchises, privileges, liberties, "statutes, laws, customs, establishments, forms of proceeding, "observances and usages, of the country of Bordeaux, in the "Bordelais, &c."

Indeed it is difficult to imagine any country of which the fundamental laws would permit the sovereign to take away private property without the pretext of necessity, or the allegation of crime.—In the most despotic countries of which we read, though life be not secured from the bow-string, nor property from arbitrary confiscation, yet neither the one nor the other is taken, except on the allegation either true or false of some crime;—and I doubt whether even in Turkey, the sovereign would venture to declare any species of private property, generally vested in the crown;—certain it is, that he could not do so consistently with the fundamental laws of the empire,—for even there, there are such laws, though they may be frequently violated with impunity.

It will hardly be contended, that the edicts of the kings of France had more binding effect than the rescripts of the Roman

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emperors;—yet we find there are bounds set to the authority of the latter in matters of private right. "Cod. 1. 19. 7. Rescripta "contra jus elicita ab omnibus judicibus refutari præcipimus."— "We command all our judges to disregard every rescript pro- "cured against law."—"Ib. tit. 22. l. 6. Omnis cujuscumque "majoris vel minoris administrationis universæ nostræ reipub- "licæ monemus, ut nullum rescriptum, nullam *pragmaticam* "*sanctionem*, nullam *sacram adnotationem** quæ generali juri "vel utilitati publicæ adversa esse videatur, in disceptationem, "cujuslibet litigii patiantur proferri, sed generales sacras con- "stitutiones modis omnibus non dubitent observandas."—

"We admonish all the judges both of the inferior and superior jurisdictions of our republic, that they suffer no rescript, no pragmatic sanction, no sacred adnotation to be used as authority in any suit which are contrary to general law or the public utility."

But the right of alluvion depends not on municipal, but on natural law. Quod per alluvionem agro nostro flumen adjicit, *jure gentium*† nobis adquiritur. D. 41. 1. 7, s. 1. Every provision therefore destructive of private property held by virtue of this general law, seems to have been considered as void even under the imperial despotism of Rome; and if this edict really declares what Mr. Jefferson says it does, the utter disregard in which I shall shew it has been held in France, would be a strong argument that the same notions as to the power of the crown prevailed there.

This edict, then, neither purports to change the law, nor if it did would it operate that effect. But after reading it what shall we say to the assertion p. 29. "By this edict, he, (Louis XIV.) declares the law of France "*incontestably* to be that *alluvions belong to the king in all navigable rivers.*" The words I have

* *Pragmatica Sanctio* was the decision of the prince by the advice of his council, and *sacra adnotatio*, was the Emperor's answer given in a *short note* at the foot or in the margin of a petition or libel.

† The words *jus gentium*, *jus naturæ*, *naturalis ratio*, are indifferently used in the Roman Jurisprudence to express the same idea.

Ait imperator *jus gentium* esse quod *naturalis ratio* inter omnes homines constituit.

"Quam ob causam et ipsam, quoque *jus naturæ* passim appellatur et æquum, et bonum, et naturalis æquitas, et natura." Vinnius, Com. on the Inst. Lib. 1. Tit. 2.

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written in Italics are marked by Mr. Jefferson with inverted commas, as a quotation from the edict itself. But the edict contains no such sentence, and its different parts have been laid under contribution for words to form it. The words *incontestably belong* are taken from the preamble where they are used in reference to attérissements and islands;—the word *alluvion* is taken from the enacting clause, where, as we have seen, it was introduced in order to give what the king had a right to give;—and thus by transposing those disconnected words, bringing them together, and coupling them with each other, the legislator is made to declare what he did not declare and to assert what he had no right to assert. It is painful to be on the watch for these misrepresentations—it is irksome to detect them;—but what must we think of the cause that forces a man of high character to have recourse to them?

Thus we have examined the whole evidence of the law of France which the president of the United States had at the time he acted, or has been able to procure since. It consists as we have seen of five partial quotations from writers, of whom certainly *four* and probably all speak a different language when fully examined: and of one edict which I think has been proved not to contain the provisions attributed to it, and which could not, and most certainly has not produced any practical change in the tenure of this species of property; for to his authorities and his edict Mr. Jefferson has not and could not add a single decision conformably to his ideas of the law. Of two things then, one: either this act does not purport to declare or change the law in the manner he contends, or if it does, the act has been deemed void; for cases are not wanting under it. The object of this edict, though it neither was meant to claim, nor does claim alluvions, was yet clearly unjust and oppressive, since it forced those who for one hundred and twenty-three years had possessed the ferries, mills, attérissements, islands, &c., on navigable rivers under regular grants, to pay a year's revenue; and those who had later grants, the income of two years.—It was made at a time when the finances of the kingdom were in the most frightful disorder. The revocation of the Edict of Nantz had destroyed the manufactures, the English and Dutch had annihilated the commerce of France, and long wars had exhausted her resources. About this time the royal plate was sent to the mint,

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offices and titles of nobility were sold, the coin was debased, every contrivance, just or unjust, was resorted to, for replenishing the empty coffers of the state; and it is not wonderful that among them we should find this attack on the occupants of islands and other royal rights on rivers; and if Mr. Jefferson's *generic term* "increment" had been designedly introduced with a view to claiming alluvial property also, it is astonishing that no cotemporaneous case should be mentioned in which that construction was put upon it. The successors of Louis the XIV., however, were not less extravagant and of course not less needy than himself. The ambiguity of this expression struck some of them as a proper engine of rapacity, and attempts were made to rob the riparious proprietors in different parts of the kingdom, of this lawful accession to their lands, but always with the same ill success; in every instance, and I shall enumerate many, the fiscal harpies were discomfited. The edict was declared not to extend to the case of alluvions, and the question was finally settled in France, by the decision of the famous case of Bordeaux.

Before I take my leave of this edict, it is very important to remark that unless it expressly *changes* the law of the kingdom, it cannot operate on this question; because Mr. J. (p. 25 *in notes*) acknowledges that Louisiana was governed by the custom of Paris, of which the *Roman law* formed a part; he acknowledges (p. 26) that the Roman law gives alluvions to the riparious proprietors, but says that this was controlled by the *ordinances*. If then the ordinances do not expressly change the Roman law in this particular, its disposition as far as respects Louisiana must prevail.

That the reader may have ample materials for drawing a fair conclusion from the arguments on this head, I shall proceed to state a succession of authorities and decisions, drawn from the French jurisprudence, which I think from their weight, number, and uniformity, must convince all those who are open to conviction.

To begin with the authorities:—

Cujas* the Nestor of the French jurisprudence, expresses himself thus: Alluvio—non est jus fisci aut principis ut ab eo

* Sometimes called *Cujacius*.

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stream, which forsakes its ancient bed and makes for itself another; this augmentation or diminution is a profit or loss to him who has the adjoining inheritance; the increase is an accessory which belongs of common right to the proprietors of the soil which is contiguous to it."

Dumoulin, on the ancient custom of Paris says: "The increase of alluvion is acquired to us in the same right by which the original soil belonged to us, nor is this increase considered as a new field, but as a part of the first."

I shall close this long list of authorities with the respectable name of *Domat;*—he teaches us that "the proprietor of an estate acquires the possession of whatever may be added to it by nature, which augments the land and becomes as it were an accessory thereto; thus the insensible increase which may be gained by an estate joining to a river by the operation of the water, is an acquisition accruing to the proprietor of the estate." 1 Dom. 268.

In addition to this long series of well digested opinions coinciding with that which I support, I had in the first discussion of the subject, (Exa. p. 31 and 35) cited the preliminary discourse of Portalis to the title in the new code which sanctions the same provisions as part of the law of France. I quoted from this discourse the assertion that the provisions of the new code were conformable to the ancient law of the kingdom as SETTLED at a period prior to the revolution, and that the contradictory opinions grew out of the feudal system. This is answered (Jeff. 34) by saying: "And here Portalis' *rhetorical flourish* is cited with triumph, as declaring that this law terminates the great question of alluvion and decides it conformably to the Roman law; it is very true indeed, that it has terminated the question as to future cases, by changing the law &c., and had Louisiana been subject to France, the law would have been changed *thenceforward*, for Louisiana also." Whoever should read this passage without having seen those to which it purports to be a reply, must imagine that Mr. Duponceau and myself had advanced the absurd proposition that the question was to be decided by the provisions of the Napoleon code. There is not much ingenuity, and there is less candor in making weak arguments for your adversary and then shewing your own strength by refuting them. Need I repeat that the articles of the new

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code and Portalis's exposition of them were cited, not to shew that the law of France was changed, but that the new provisions were conformable to the old law; not to take advantage of a change, but to shew that there had been none; and to prove, by the declaration of one of the first lawyers of modern France, that the law was *settled* prior to the revolution, by a *solemn decision** on the side of the question that I espouse.—This argument pressed hard on the late president, and he gets rid of it by calling a plain sober opinion a "*rhetorical flourish*," and by inventing for his adversaries a ridiculous argument which they never used.

In the discussion to which I have been obliged more than once to refer, (Ex. p. 31) I expressed myself as follows:

"A most persuasive, if not a conclusive argument, that the law of France is as I have stated, may be drawn from the following circumstances and opinions. When the first consul undertook the great task of giving a general system of jurisprudence to France, he caused his Digest or *Projet de Code*, to be prepared by the first lawyers in the country. This was printed, and a copy sent to every superior tribunal in the republic, for their consideration; and, after a proper period, it was returned with such remarks and amendments, as had occurred to the different judges, that the legislature might, prior to its final adoption, have the benefit of the best legal advice on its different provisions."

"The articles in this *Projet*, relating to the subject under discussion, are contained in the second section, second title of the second book, and are as follows:

"15. The collections of earth, (attérissements) and accessions which are annexed successively and imperceptibly to the land, bordering on a river or navigable stream, are called *alluvion*. Alluvion belongs to the riparious proprietors, when it takes place on a river, whether it be navigable or capable of carrying rafts or not; under the condition, in the first case, of leaving the path prescribed by the regulations."

* I shall presently state at full length, the whole of this celebrated case, from the original printed documents, a set of which is in my possession, and another in that of Mr. Duponceau. I was not able to procure these documents until a late period of this controversy; and therefore, in my former publications, I could only speak of this important decision in general terms, principally on the authority of M. Portalis. This has emboldened my adversaries to treat that high authority with neglect, and style it a *rhetorical flourish*. But now the facts shall speak for themselves.

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"16. The rule is the same with respect to the running water, which retires insensibly from one of its banks, and encroaches on the other; the proprietor of the shore which is left dry, shall benefit by the alluvion, and the proprietor of the opposite shore, shall not be permitted to reclaim the land which he has lost."

"If," I continued, "this part of the projet had made any change in the ancient laws of the country, some of the learned men to whom it was submitted, would have taken notice of the novelty, with marks either of censure or approbation; but we find them all either passing over the articles as declaratory of the old law, or else expressly acknowledging them as such, and stigmatizing the doctrine now contended for by Mr. Derbigny, as an oppressive, and ineffectual attempt to pervert the laws of the kingdom."

"To begin with the tribunal of Paris: they set out with this general observation on the part of the code containing the provisions. "The rules proposed," (they say) "on the subject, are in general conformable to what has ALWAYS BEEN PRACTISED, and gives occasion to but very few observations," and among those few are none on the subject of alluvion."

"The tribunals of Nancy, Nimes, Orleans, Riom, Liege, Metz, Montpellier, Agen, Aix, Grenoble, Poitiers, Rennes and others, pass over these provisions as matters of course, or recommend a slight alteration, to prevent disputes between the proprietors of lakes and the adjoining land."

"The tribunal of Rouen has these strong expressions, speaking of the nineteenth article of the *Projet de Code*, which declares islands in the middle of navigable rivers to belong to the nation; they say:

"The Roman law gave to the adjoining proprietors the islands which were formed in navigable rivers; a disposition which appears more equitable than this article of the Code, and MORE WORTHY OF A GREAT NATION, whose true interest is not to acquire property to the injury of individuals."

"The edicts and declarations of the former kings, which claimed for the domain the ISLANDS of navigable rivers and *fleuves*, (primary rivers) were mere FISCAL LAWS; these laws were founded on the FALSE PRETEXT that the islands were an appendage of the river, which they considered as belonging to the king. But,

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"1. The river itself is not a national domain, but a thing of which the public have the use; it belongs to the nation not in full property, but as an appendage of its sovereignty."

"2. The islands are not appendages to the waters of the river, but to the bed of the river; the right of individuals to which is acknowledged when the river abandons."

"3. An island cannot be formed without increasing the width of the river at the expense of the adjoining land; and the damages to which the proprietors of these lands are exposed, should entitle them to the islands, as an indemnity for the risks and losses they incur."

"The principle which we propose, would not at all invade the public right to the islands which the nation possesses, or for which they have positive titles; but it would tranquillize those individuals, who, FOR AGES, have possessed islands in the rivers as the true owners, and whom the agents of the domain HAVE always vexed without having EVER SUCCEEDED IN DESPOILING THEM OF THEIR ESTATES."

Thus, in the publication above referred to, I stated the opinions of the different tribunals of France, when consulted on the very question before us, and the correctness of my statement is not denied. And yet, (who would believe it?) Mr. Jefferson is pleased to dismiss this powerful mass of authorities, with the unfounded assertion, that they are silent on the subject of alluvions. (See Jeff. p. 35.) "The tribunal of Paris," says he, "is quoted *with an acknowledgment that they do not make a single observation on the subject.*" A more extraordinary attempt to mislead, I have seldom witnessed. I am made to acknowledge, that the tribunal of Paris does not make a single observation on the subject, when the quotation I give from their opinion declares, "that the rules proposed on the subject," (what rules? why those in the *Projet de Code*, among others, giving alluvions to the adjacent proprietor) "are in general conformable to what has ALWAYS BEEN PRACTISED, and give occasion to but very few observations." Here then, I think, is not only an observation, but a strong expression of opinion that the new law was conformable to the old, or, at least, to what had always been practised under it; and to shew that they did not consider the proposed rules, on the subject of alluvion, as an innovation on what *had before always been practised.* I admit that in the few *other* observations they make, there are none on the sub-

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ject of alluvion; yet from the very ingenious mode in which the assertion of my wily adversary is made, every one who reads his reply will imagine, that I had fully acknowledged, that the tribunal of Paris had made *no observation whatever* on the subject in question, although I quote an expression of their opinion in the strongest terms. On the same passage he asserts, and afterwards repeats, "that neither the word *alluvion* nor the *idea* is to be found in *any of the quotations.*" How can this repeated, this solemn assertion be reconciled with the quotation from the tribunal of Paris, when speaking of the rules proposed on the subject of ALLUVION they say, that they *are conformable to what has always been practised?* How can any man assert that the *idea* of alluvion is not to be found in any of the quotations? How can he assert it, in the face of the second reason, given by the tribunal of Rouen, that "islands are not appendages to the waters of the river, but to the *bed*; *the right of individuals* to which, is acknowledged when the *river abandons it.*" Now if the title of the adjoining proprietor to the whole bed of the river is acknowledged, when it is abandoned by the water, does it not follow *a fortiori*, when a portion of it is abandoned in the case of alluvion, that the title is equally incontestable: The idea then of private right to alluvion, is presented in the whole of this quotation, and expressed in the most pointed manner, since the public right in the stronger case even of islands and accretions in the bed of the river is denied.

My reasoning, it is said, cannot be characterized respectfully. It may probably be weak and inconclusive; but I trust it does not deserve those epithets which can alone designate the attempts made to misrepresent it.

Having thus given the opinions of the most celebrated French jurists, both ancient and modern, and added to them the sentiments of those legislators, who, in making new laws, declare what the old were, I proceed to fulfil the residue of my promise, by shewing a series of decisions on this head, all of them in direct contravention of those principles, which it is pretended were established by the edict of 1693; all of them denying the royal right to alluvions, and enforcing that of the adjacent proprietor.

The first is the case mentioned by Denisart, and reported by Guyot, adjudged on the 15th of April 1774, between the marquis de Bouzols and M. de Chamflour, in one of the

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sections or chambers of the parliament of Paris, denominated the fourth chamber of Inquests, (*des Enquêtes.*)

The second case is also mentioned by Denisart, as having been determined on the 22d of February, 1769, between the chapter of Luçon and M. Champagné.

These two cases turn chiefly on the distinctions between augmentations made slowly by alluvion, and those which are created on a sudden, and decide *that the first belong to the adjacent proprietor.**

The third was decided in the parliament of Paris, the 18th of March, 1765. The marquis of Langeron owned a fief, to which was attached the right of *haute justice*, upon the Loire, by virtue of which he claimed all the alluvions on that river, as being attached to his domaine; *and he cited as a decisive authority the edict of* 1693. His pretensions however were disallowed, and the land, formed by the alluvion of the river, was adjudged to the nuns of Marcigny, who claimed it as the riparious proprietors. This case is reported by Larvé, in his Théorie des Matières Féodales, which I have already cited.

Here, then, is one decision, of the highest judicial authority in the kingdom, rendered more than seventy years after the edict of Louis XIV had, as is asserted, put aside all doubts as to the general law of France; rendered on a full consideration of that edict, and directly contrary to that doctrine, which, it is pretended, was thereby established. What answer can be given to the irresistible argument drawn from this decision? Perhaps the same given to the decision in the case of the parliament of Bordeaux, (p. 34) "that it proves only that the Roman law of alluvion, was the law of the generality of Bordeaux, not that it was the law of *all France.*" If so, let me respectfully ask the learned author to turn to the 24th page of his valuable work, and tell the world how he can reconcile the existence of the Roman law of alluvion at *Bordeaux*, with his assertion of the paramount authority of the edicts, if those edicts did, as he says, *put aside* all further question as to the law of *France* on the same subject.

See to what a dilemma he has reduced himself in the pertinacious defence of a bad cause? He acknowledges (p. 25) that the Roman law formed part of the custom of Paris, and was

* See Denisart's statement of these two cases, above, p. 149.

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transferred with it to Louisiana. He acknowledges (p. 26) that by the Roman law, alluvion belongs to the adjacent proprietor; but he says (p. 28 and 30) that the edict of Louis XIV being paramount, and prior to the charter of Louisiana, changed the law. Now if this edict changed the *custom of Paris*, why did it not change the *custom of Bordeaux?* Either therefore the answer to the Bordeaux decision is a bad one, or the argument from the paramount effect of the edicts is good for nothing.

To that Bordeaux case I now return, and shall shew that the terms of its decision, preclude even the wretched, inconsistent answer that has been given to it. It has finally settled all question on the subject, and is the last I shall cite. These were its circumstances:

On the 5th of July, 1781, an *arrêt* or order of the king in council was passed, of which the preamble declared, " that all or the greater part of the isles, (*islots*) accumulations, (*attérissements*) alluvions and deposits (*relais*) in the rivers Gironde and Dordogne, and on the coast of Medoc, from the point of Lagrange to Soulac, which forms an immense extent of ground in the space of twenty-two leagues, appearing to be usurped, there was an absolute necessity, for the interest of his majesty, to know the extent &c." Therefore the arrêt directed the grand master of the waters and forests of Guienne, " to proceed to the verification and search of those isles, alluvions and deposits, formed in the rivers Gironde and Dordogne, and on the coast of Medoc, from the point of Lagrange to Soulac;" and it directed surveys and plans to be made of those lands.

As soon as this arrêt was made known, and attempted to be executed at Bordeaux, the king's attorney general, whose duty it would have been to enforce the execution of the edict, had it been legal, came into the court of parliament, and communicated its contents; accompanying it with a motion, (*requisitoire*) of which the following is an extract: " The lands of *Medoc*, which the arrêt calls usurpations on the domaine of the king, are the shores (*les bords ou le rivage*) of the Gironde. They are morasses, of which the waters run into the river, or which are covered by those of the river in high tides; the first have been *enlarged* or *extended* by the *sand, which the flood has carried in*, by detaching it from other places on the same side of Medoc, so that what some have lost, others have gained; this sand is consoli-

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dated, and *the industry of the inhabitants* has opposed *dykes* to the *efforts of this great river*. The second have been drained more than a hundred and fifty years, and this draining was made by virtue of *arrêts* of the council, who were impressed with the necessity of preserving this valuable property to the inhabitants."

"The Roman law and the *ordinances* of the kingdom, unite (pursues the KING'S ATTORNEY GENERAL) to secure to individuals the property of the *shores;* (rivages) *proprietas riparum illorum est quorum prædiis hærent; quâ de causâ, arbores quoque in eisdem natæ, eorumdem sunt.* 4 Ins. de Rer. Divis. §. Riparum 4. The seventh article of the twenty-eighth Title of the Ordinance of August 1669, on the subject of waters and forests, enacts, "*That the proprietors of estates bounded by navigable rivers, shall leave along the shore* (bord) *twenty-four feet at least in width, for a royal road and tow-path for horses, &c.* This article is only a repetition of the third article of the ordinance of Francis I. of May, 1520; the consequence is easily drawn. The shores of rivers may then be the property of individuals, charged with the servitude which is imposed for the public service. In a word, the property of the shores is vested in those who are proprietors of the adjacent lands; because, as Vinnius says, on the section *Riparum*, that which is not occupied by the river, is supposed to make a part of the neighbouring land. "The imperceptible increase," says *Ferriere*, on the § *Præterea*, 10 *Inst. de Rer Divis.* which the law calls *incrementum latens*, and which the river detaches, little by little, from one estate, and adds to another, "belongs, by accession, to the proprietor of the estate to which it is joined; because, *fundus fundo accrescit, sicut portio portioni.*" The attorney general then proceeds to cite *Demoulin* and *Lefevre de la Planche*, whom I have quoted above, with the observation, "that the same maxims are found in authors the most favourable to the *rights of the domaine.*"

"After considering principles so certain as these," (he adds) "it is difficult to imagine how the administrators of the domaine, could have imposed on the good faith of the council, so as to procure the arrêt," &c. and after a variety of observations in the same style, he concludes by proposing an humble remonstrance to the king; and in the mean time a stay of the execution of the

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arrêt, until the pleasure of the king should be more clearly expressed. This measure was adopted by the parliament, "*for the reasons*" (*as they say*) "*set forth in the motion*" (requisitoire) "*of the attorney general.*" They order a *remonstrance* to the king, and an *injunction* against the execution of his arrêt.

On the 31st of October, 1783, the king in council, not satisfied with the conduct of the parliament of Bordeaux, in opposing the execution of the arrêt of 1781, by a new arrêt orders the execution of the first, and revokes the sentence of the parliament. On the service of this new order, the same attorney general presents a new *requisitoire* to that high court, containing very strong and spirited remarks on the conduct of the king's council. After describing, in lively colours, the dismay of the alluvial proprietors, at the illegal operation of the king's arrêt, he says: "they have still hopes;—they know that they shall find in the parliament generous defenders, who will never cease to assert in their favor the rights which secure their property; they know, and it re-animates them, that the magistrates will employ the authority which is entrusted to them, to arrest the violence of the instruments of the fisc, and oppose their usurpations."

I must interrupt my extract; it affords too painful a contrast between the minister of an absolute monarch, and the representatives, the magistrates of a free people. In France, the victim of oppression found a defender in the creature of the monarch who wronged him; he was reminded that a *French parliament* would never cease to defend his rights, and that the *authority* of the magistrate would shield him from violence. He was told this, and it was not a vain boast. Royalty itself respected his possessions; it bowed to the majesty of the law; and after an ineffectual struggle, gave up the contest. While here the free citizen, of a free and enlightened republic, is despoiled of the *same species of property*, claimed under colour of the *same laws*, by military violence; and he finds no parliament to remonstrate, no magistrate to defend him;—he is denied even a hearing; and the first officer of a republic succeeding to the claims of a *French monarch*, is permitted to enforce them in a manner, and to an extent, which the king could never dare, in the plenitude of his power, to do.

The attorney general proceeds in the same eloquent and manly style, to discuss the rights of the crown, to assert those of the

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judiciary; and declares that, "although deeply impressed with respect for the laws which guard the national domaine, and with a sense of his duty to enforce them, he yet feels that there is another duty attached to his office; a duty of a superior kind: that of taking care that the name of the sovereign should not be used to oppress the subject, or deprive him of his inheritance." He closes by proposing another *remonstrance*, and a second *injunction* to the grand master of the waters and forests, *not to execute the royal decree*, "until the king should explain himself, in a legal manner, with respect to the rights claimed by the administrators of the domaine to the shores of navigable rivers, and the accretions, alluvions and *attérissements* which may be formed there." This is accordingly decreed by the court; the *injunction* issues, and it is *obeyed*. No officer of the crown, in an absolute monarchy, is found hardy enough to disregard the judgment of a competent court; no regiments of militia are ordered out to enforce the mandate of the sovereign, in opposition to it. The regular troops at Bordeaux, are not ordered to be in readiness to massacre those who might be inclined to support the dignity of the laws. The remonstrance is presented to the sovereign, and in the mean time, his reiterated mandate remains unexecuted.

The king and council however still persevere, and on the 16th of October 1785, revoke the last arrêt of the parliament, and direct a special agent to go to Bordeaux, and see the registering and publication of the king's order executed in his presence. The parliament, however, does not abandon the cause, or forget the dignity of their functions; they protest against every thing done in consequence of the arbitrary order of the crown, and issue another arrêt declaring the transcription of the king's mandate, "*null, illegal, and incapable of producing any effect*," ordering another *injunction* against its execution, directing an appeal to the nation by a publication of all the proceedings, and finally another remonstrance to the crown. This last paper is dated 30th June, 1786; it is a learned and eloquent assertion of the rights of riparious proprietors in opposition to the sovereign's claim of alluvions on the navigable rivers of France.

Finding that the parliament of Bordeaux was not either to be deterred from the performance of its duty by the fear of royal displeasure, or dragooned into submission, and that they them-

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selves were engaged in an illegal and unpopular claim, the counsellors of the crown were now only solicitous to obtain an honourable retreat. The public discussion of the subject had shewn so conclusively that neither the edicts nor the general law of France, gave this species of property to the king, that their only resource was to declare *that he had never claimed it.*—Accordingly, by letters patent, dated the 28th July 1786, reciting all the proceedings which I have detailed, the king declares that his *arrêts have been misunderstood*, that they were intended only to have the property *surveyed*, but not to take it; he directs, indeed by way of salvo for his dignity, that all the arrêts of the parliament shall be annulled, and that the surveys ordered by him, shall be made; but concludes with these words, which I should imagine would dissipate all doubts relative to these royal rights.—"We order therefore the grand master of the waters and forests of Guienne, to proceed with the *procès verbal* and surveys directed by our said letters patent: PROVIDED ALWAYS THAT IT SHALL NOT BE INFERRED FROM THENCE, THAT THE ALLUVIONS, ACCRETIONS AND DEPOSITS FORMED ON THE BANKS OF THE SAID RIVERS OR OF ANY NAVIGABLE RIVER, CAN BELONG TO ANY BUT THE PROPRIETORS OF THE SOIL ADJACENT TO THE SHORES OF SAID RIVERS; AND TO US, WHEN THE SHORES OF THE SAID RIVERS ARE ADJACENT TO THE SOIL OF LANDS BELONGING TO OUR DOMAINE.* Nor do we intend, under pretext of searching for and ascertaining what lands belong to the domaine, to disturb the proprietors in the possession and enjoyment of the fiefs, lands, lordships, and other property which has been anciently held by them or those under whom they claim, and which does not appear to be part of our domaine; and we order moreover,

* "*Sans néanmoins que l'on en puisse induire que les* ALLUVIONS, *attérissemens et relais formés sur les bords* des dites rivières, NI D'AUCUNE RIVIERE NAVIGABLE, *puissent appartenir à d'autres qu'aux propriétaires des fonds adjacens à la rive desdites rivières, et à nous lorsque la rive desdites rivières sera adjacente à des fonds de terre faisant partie de notre domaine.*" It is to be here particularly observed, that the king does not speak merely of the alluvions of the Gironde and Dordogne, which were the particular subject in controversy, nor of those rivers only which flow through the district of Bordeaux, but he expressly says, that he does not claim the alluvions *formed on the banks of the* SAID RIVERS, *nor those of* ANY OTHER NAVIGABLE RIVER. What becomes, now, of Mr. Jefferson's learned distinction between the custom of Bordeaux and that of Paris?

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that these letters patent which we have ordered to be transcribed in our presence on your minutes, shall be read, published and affixed, wherever it shall be needful."

After this formal recognition of the principles I contend for, by the highest judicial and legislative authority in the kingdom; after this solemn disavowal of the regal rights set up by my adversary;—after the publicity given to the decision, at a time when, if I mistake not, Mr. Jefferson filled a high station in the capital of France, it is a little extraordinary to hear him assert so positively that since the edict of 1693, no doubt could exist as to the laws of France on the subject of alluvion, and that those laws vested them in the king. The pertinacity with which this opinion is adhered to, is the more extraordinary as the position was abandoned by two of his fellow labourers, out of three in the same cause, and by the two who being educated in France, were, without any disparagement to the acknowledged merit and talents of the third, better qualified to determine a question of French law, than any gentleman whose professional education was entirely American. The solicitude of our author to obtain the support of his two colleagues on this important point is truly ridiculous.—In a laboured note (p. 37) he tries to coax Mr. Moreau out of his opinion, or to persuade the world that "*he is not decided*" in pronouncing it, and his extracts now shew me, why this *memoire* of Mr. Moreau* was never suffered to meet my unhallowed eye. The secretary of state once (I believe inadvertently) mentioned its existence, but on my expressing a desire to see it, changed the conversation, and I found there were reasons why it was deemed improper to communicate its contents.

The decided manner in which his other advocate, Mr. Thierry, had opposed this favourite doctrine, gave Mr. J. no

* In this note the author states that the distinction made by Mr. Moreau between alluvions in the bed of the river and on its banks, "*is new in this cause, having never been claimed by the plaintiff or his counsel, or suggested by any other who has treated the question.*" This is one of those gratuitous assertions with which the book abounds; in my first publication on the subject, (Ex. p. 18) the same argument will be found, and the same construction of the edict enlarged on, although I did not know at that time that it was the identical construction which had been adopted and relied on by the attorney general and parliament of Bordeaux, in the celebrated controversy above mentioned, and which was finally submitted to by the king of France and his council.

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ticular governments may have derogated from the natural rights of individuals, the one in question depends not on "*the nature of the grant from the sovereign*," at least, not in the sense in which our author means it, which is, that whenever alluvions are not expressly granted, they are reserved, and are to be considered as vacant lands, which the sovereign may keep for himself, or grant to whom he pleases; for even admitting that the sovereign has the right to grant all vacant lands, yet this species of property, which is formed by gradual annexation to land before granted is never vacant, and of course cannot become the subject of the sovereign's right. This results from the nature of its creation;—it is *imperceptible;*—at what moment then can the sovereign right attach? It is incorporated with the private soil,—how then can it be separated? Its formation is carried on in secret, it is *latent*,—how then can it be discovered during the process? We find all these characteristics given in the definitions so frequently quoted.

Est enim alluvio incrementum *latens*. Per alluvionem autem id videtur adjici, quod ita *paulatim* adjicitur, ut *intelligi* non possit, *quantum* quoquo temporis *momento adjiciatur*.—"Alluvion is a latent increase. That appears to be added by alluvion which is added so gradually that we cannot know how great is the increase of each moment of time." II. Ins. Tit. 1. s. 20.

For these reasons we find the imperial law expressly referring the right not to any grant, but to the *law of nations;* which as we shall see is here used not in the modern sense of the code which binds nations in their intercourse with each other, but as synonimous to *natural right*. Præterea quod per alluvionem agro tuo flumen adjecit, *jure gentium* tibi adquiritur. "Moreover, whatever is added to thy field by alluvion, becomes thine by the law of nations." II. Ins. *ibid.*

Quod vero *naturalis ratio* inter omnes homines constituit id apud omnes gentes peræque custoditur: vocatur que *jus gentium* quase quo jure omnes gentes utantur. "What *natural reason* hath prescribed to all men, is observed among almost every people, and is called the *law of nations*, as being the law observed among them all." I. Inst. Tit. 2. s. 1.

And in the commentary of Vinnius on this text, the same idea is enforced. "Ait imperator *jus gentium* esse quod *naturalis ratio inter omnes homines constituit*—unde sequitur jus hoc

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non ex legibus aut institutis populorum estimandum esse sed ex êo quod justum esse dictat ipsa ratio naturalis id est insita animis hominum notitia de honesto et turpi justo et injusto quam ob causam et ipsam quoque *jus naturæ passim appellatur* et æquum et bonum et naturalis æquitas et *natura.* "The emperor says, the law of nations is that which natural reason has prescribed to all men. Hence it follows that this law is not to be tested by the laws or institutes of particular nations, but by that which natural reason itself dictates, that is the notions of virtue and vice, of justice and injustice, which are innate in the mind of man. Wherefore it is called indifferently *the law of nature, what is just and right, natural equity and nature.*" Vinn. in Ins. p. 15.

Here we find the nature of that code defined, to which we are referred for the origin of this right, and from thence it may be inferred that even admitting the doubtful principle that all landed property was first vested in the nation, and by it parcelled out among individuals, yet all alluvions accruing to lands after they were granted, would not be the property of the sovereign, but of his grantee.—Mr. Jefferson himself acknowledges, page 42, that alluvion is an *accessory*, an *appendage*, an *appurtenance*, cites the maxim *that an accessory follows the nature of its principal*, and says that the equity of the right of alluvion was founded on the maxim "*qui sentit onus, sentire debet et commodum*," that as the owner was exposed to loss from the river, he ought to be indemnified by the increase of alluvion. Is it not extraordinary that with such materials in his hands he could not form the obvious conclusion, that after the grant was once made by the sovereign, the *accessory* which was subsequently attached to it belonged according to the principles of *natural right* to the grantee?—but, instead of this, he bewilders himself and his readers in a useless search into the origin of property lands; a research utterly nugatory, because whether the title came first from the sovereign or not, the moment the land on the bank became private property, the subsequent alluvion was an *accessory*, which he acknowledges must follow its principal, by the rules of natural equity—and therefore must also be vested in the proprietor of the land, not in the nation.

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II. We next come to a position of which Mr. J. seems peculiarly enamoured, viz. "*That the right of alluvion accrues only to rural, not to urban possessions, and therefore that had the batture been an alluvion, and governed by the Roman instead of the French law, the conversion of the plantation of Gravier into a suburb made it public property.*" These words, I should suppose, mean, that although Gravier's plantation had been increased by alluvion to a very considerable extent, prior to his laying it out into a suburb, the very act of dividing it into lots, vested in the public all that part which had been created by alluvion; an assertion which he leaves unsupported by either argument or proof; and which modifies his position, in a manner that renders it entirely inapplicable to the present case. This position is, "that the Roman law gave alluvion only to the *rural* proprietor of the bank; *urban* possessions being considered as *prædia limitata.*" Now, admit this wild assertion to be true: does it follow that the alluvion created before the ground became a city belongs to the public? On the contrary, does not Mr. J. himself allow that it is an accessory, and that the accessory must follow the principal? If this be so, the question is at an end: because the ground on which my house stood, and from which I was driven, was formed long before the existence of the suburb.

But the position is not only inapplicable, but unfounded. Let us examine how it is supported. The Institute in defining this species of property, or rather this mode of acquiring it, says, "What the river has added *agro tuo*, by alluvion, is thine;" the Digest uses the same expression. Now *ager* in Latin and *agros* in Greek, mean a *field*. Land in the city is called *area*, a lot. Therefore you must shew, says the conclusive and most learned reasoner, that your alluvion accrued to a *field*, or you are not entitled to it: because there are no *fields* in a *city*. I must answer this argument, or it will be supposed that this very learned page has silenced me; and many an honest citizen who understands no Greek, but "*honors the sight*" as much as Boniface did "*the sound of it*," will suppose some unanswerable argument lies hid in the cramp characters that adorn it. Seriously, then, let me tell my very learned adversary, first, that *ager* in Latin means not only a *field*, but the generic term *land*, and that too, situate in a village, and to take away all cavil, in a *city*.

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Formâ censuali cavetur ut AGRI sic in censum referantur: Nomen fundi cujusque, et in quâ *civitate* et quo *pago* sit. Dig. 50, tit. 15. lex 4. 1. "In the tax list let it be observed, that the *lands* (*agri*) be thus reported: the name of each estate, and in what *city* or in what *village* it is situate."

"Is vero qui *agrum* in aliâ *civitate* habet, in eâ *civitate* profiteri debet in quâ *ager* est." Dig. 50. 15. 4. 2. "But he who hath *lands* (*agrum*) in another *city*, should be credited in the *city* in which his land (*ager*) is situate."

Here we see that *ager* is used for landed estate, either in a *village* or a *city;* and that there may be no doubts raised as to the signification of the term *civitas*, let us see what is its definition.—"*Civitatis* appellatione non veniunt suburbia, sed id solum quod murorum ambitu terminatur."—Calvin's Lexicon, verbo *civitas*. "Suburbs are not comprehended in the term city, but that space only which is contained within the walls." Again, we find the term *ager* used in the same sense, in the 50th Dig. tit. 8. l. 9, § 2.—"Item rescripserunt *agros* reipublicæ retrahere curatorem *civitatis* debere," &c. Here the administrator of the *city*, is directed to reclaim the *lands* (*agros*) of the public; a duty that would have been devolved on the *præses provinciæ*, if the property had not been situate within the *city*.

Secondly, I may be permitted to remark that the Roman law, in speaking of alluvions, does not confine itself to those which are annexed to a field, (*ager*) but indifferently uses the term *fundus*. Take a few out of many examples: "Id alluvionis jure ei quæritur, cujus *fundo* accrescit." Cod. 7. 41—1. Sed et si post emptionem *fundo* aliquid per alluvionem accesserit, ad emptoris commodum pertinet. 3 Ins. tit. 24. § 3.

"Ergò si insula nata adcreverit *fundo* meo, et inferiorem partem *fundi* vendidero," &c .Dig. 41. tit. 1. l. 30.

"Altius *fundum* habebat secundum viam publicam," &c.&c.—Ib. l. 38. Here, and in numerous other instances, the expression is *fundus;* a term of the most general import, fully answering that of *land* in the English law, and expressly including *town-lots*, *town-houses*, and every other species of real property, either in town or country, as we find by the following:

"*Fundus* est omne quidquid solo tenetur—*ager* est si species fundi ad usum hominis comparatur."—Dig. lib. 50. 16. 115.

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"*Fundus*, (*land*) is every thing which is fixed to the soil—it is *ager* if prepared for the use of man."

"*Fundus:* Id omne significat quidquid solo seu terrâ tenetur, seu ager, seu villa seu prædium seu ædificium, seu stabulum, seu AREA, seu insula sit."—*Calvini Lexicon Juridicum*, verbo *ager*. "*Fundus* signifies every thing that is fixed to the soil or the earth, whether it be a field, or a *country seat*, or a *tavern*, or any real *property*, (*prædium*) or a building, or a *town-lot*, (area) or a town-house, (*insula*)."

That *fundus* relates to *urban* as well as *rural* property, may be also shewn from the following passage:

"Quærebatur, si quis *à Siciliâ* servos *Romam* mitteret *fundi instruendi causâ* utrum pro his hominibus portorium dare deberet, nec ne?"—Dig. 50. 16. 203. Here the general term *fundus*, is clearly used for an estate in a city; for the question supposes the slaves to be sent from Sicily to *Rome*, for the purpose of furnishing the *fundus* (the estate) there. Again: "*Fundi* appellatione *omne ædificium et omnis ager* continetur."—Dig. 50. 16. 211.

I might multiply these quotations to an extent that would be fatiguing to the reader; these, certainly, are sufficient to shew, that both *ager* and *fundus* are general expressions, which embrace every species of estate; but to make the law on this subject still more explicit, I may add that the Roman jurisprudence not only speaks of alluvions as being incident to the *ager* and the *fundus*, but the *prædium* also; thus using every expression to shew, that it was not confined to any one species of real property, to the exclusion of the others.

"Inter eos qui secundum unam ripam *prædia* habent, insula in flumine nata non pro indiviso communis fit, sed regionibus quoque divisis."—Dig. 41. 1. 29.

In the Institutes, lib. 2. tit. 1, § 22: "Insula in flumine nata, (quod frequenter accidit si quidem mediam partem fluminis tenet) communis est eorum, qui ab utrâque parte fluminis *prædia* possident, pro modo (scilicet) latitudinis cujusque *fundi*."

And in the Digest 41. 1. 7, we have an example of the three expressions, *ager*, *fundus* and *prædium*, indifferently used:

"§1. Præterea quod per alluvionem *agro* nostro flumen adjicit, jure gentium nobis adquiritur.—

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§ 2. Quod si vis fluminis partem aliquam ex tuo *prædio* detraxerit et meo *prædio* attulerit, palam est tuam permanere. Planè si longiore tempore *fundo* meo hæserit, arboresque quas' secum traxerit in meum *fundum* radices egerint, ex eo tempore videtur meo *fundo* adquisita esse."

The word *prædium* is still more generally used, in the most comprehensive sense, than either *ager* or *fundus*, and is derived, according to Varro, from *per hæredium*, or, as we should term it, an estate of inheritance. After the definitions of *ager* and *fundus*, the 115th law of the Dig. de *verb. signif.* gives us the signification of *prædium* as follows:

" *Prædium* utriusque suprascriptæ generale nomen est."

" *Prædium* is the general name for both the preceding terms."

But I think in the reasoning to which Mr. Jefferson refers me, and which he makes his own, it is said that there are *prædia urbana* and *prædia rustica*, city estates and country estates, and that I shew nothing, unless I shew that the right of alluvion accrues to the former by *name;* but surely when I shew that it accrues generally to *estates*, to *land*, to the *soil:* when I shew that every term used to express an interest in real estate, is employed on the occasion, I shew enough to throw the burthen of any exception upon my adversary. I might say to him: I have shewn that this right accrues to the *ager*, to the *fundus* and the *prædium;* and I have shewn, by the most approved definitions, that all these terms include lands in the city as well as the country. If the law however does not apply to city property, do you shew it. There is, sir, I know, the *prædium urbanum* and the *prædium rusticum;* but permit me, most learned civilian, to suggest to you, that there is also the *servus urbanus* and the *servus rusticus*, and that you might as well tell me, when I cited any one of the thousand laws on the subject of *town* generally, that it did not apply to the *town slave*, because he was not particularly named;—nay, you might make the same exception to the *country slave*, and thus shew, that what applied to all generally, could not affect any in particular. And, if it were not too presuming, I might add, you have made a slight mistake, in supposing that *prædia urbana* were always situate in a city; the name, sir, has misled you.* Before you write books

* Urbana prædia omnia ædificia accipimus, *non solum ea quæ sunt* in oppidis, sed, et si forte stabula sunt vel alia meritoria in villis et vicis vel si prætori

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on the civil law; and above all, before you rely so much on your knowledge of it as to strip a citizen of his property, it would be well to study and digest its principles. Its maxims are,—"*id eo quod plus est semper inest et minus;*" "*In toto et pars continetur;*" "*semper specialia generalibus insunt.*"—Ponder on these, learned sir, and do not insist that a bequest of horses, generally, does not include those of the testator, because they happen to be white horses,* black horses, or even pied horses.

But if you will not be content, without a positive law, that the right of alluvion accrues to property in the city as well as the country, I believe, sir, I must gratify you. If it had not been, however, for the bad habit you have fallen into, of being learned at the expense of others, of repeating quotations without looking at the text, you would have saved me this trouble, and yourself the mortification of repeating a triumphant challenge to produce an authority which you would then have seen was under my hand.

You have repeated, after those who went before you, the quotation, "In agris limitatis jus alluvionis locum non habere constat;" had you read the rest of the same law, you would have found the very authority you challenge now to produce: "Et Trebatius ait, agrum qui hostibus devictis eâ conditione concessum sit ut in *civitatem veniret*, HABERE ALLUVIONEM;" "and Trebatius says, that land conquered from the enemy, and granted on condition that it shall be included in a city, is entitled to the right of alluvion."

I repeat that I need not have produced this authority, and that nothing but my desire to oblige you, sir, has induced me to submit it to your inspection; but after this I hope we shall not have a third repetition of the challenge.—Such might be my address to my erudite adversary, if I were not restrained by respect for the *conviction* he expresses of the *soundness of the principles* I am forced thus reluctantly to attack.

voluptati tantum deservientia; quia urbanum prædium *non locus facit* sed materia; proinde *hortos* quoque, si qui sunt in ædificiis constituti, dicendum est urbanorum appellatione contineri.—*Calvini Lexicon, verbo* PRÆDIUM.

* See the learned case of *Stradling* v. *Stiles*.—Serjeant Catlyne's argument is, I think, rather better than the late president's; but perhaps I may not do justice to the latter, for like Swift's unfortunate reporter, "*Jeo fuis disturb en mon place.*"

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The common law of England is next resorted to; and I am again challenged to produce a decision under that law, where the right of alluvion to *city property* has been allowed. Having shewn one under the law which governs the country in which the lands lie, I have, I think, done enough; but I am resolved that none of the wretched shifts resorted to shall go unexposed, and that the president of the United States shall not have it to say, that his conduct would have been legal had the land been in England, and he, king of that country.

First, then, I answer this appeal to the common, as I did that to the civil law, by giving the general rule, and calling on my adversary to shew the exception, if it exist. *Blackstone*, speaking of this species of property, even in the strong case of alluvions of the sea, says, "And as to *lands* gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction &c.: in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining."* The same law (he says, a little below) applies to a river. Now as *land*, in the English law, means every species of soil, whether *urban* or *rural*, as a lot of *ground* does not cease to be *land*, although it be situate in a city, I should suppose this general expression would be sufficient to shew, that the king would have no right to the property in question, were it situate in England. But to this Mr. Jefferson gives a most conclusive answer: "In towns, the whole bank and beach being necessary for public use, the private right of alluvion would be inadmissible."† How does it happen then, that in every city in the United States, the shores and wharves are private property, except in the cases where the legislature or the king, may have granted them to the corporations, in which cases they possess and use them as individuals? If they were "*necessary*" for public use, they could never be private property; if the private right of alluvion were "*inadmissible*" it would never exist. But *necessary*, in Mr. Jefferson's vocabulary means *useful*, and *the public*, means those who administer its affairs. Whatever therefore is useful to promote the popularity of the president, is necessary

* 2 Black. Com. 261. † Jeff. p. 40.

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to the public, and it is in this sense only that his allegation can be reconciled to truth. The question of the right of alluvion to town-lots, has arisen and been decided in the United States. The lands were situate in Newburyport, and the case is reported in Tyng's Massachusetts Reports, vol. 3, p. 353. *Adams* v. *Frothingham*. It was decided according to the common law of England, not by virtue of any state regulation; and the judgment affirmed the right of alluvion to the proprietor of a *town-lot*.

But the whole body of American judges are proscribed; their decisions are no rule for Mr. Jefferson. "Special circumstances (he says) have prevented attention in America either to the law or the breach of it." What those circumstances are which would make learned and upright judges neglect the law, or enlightened magistrates disregard the interests of the public, he has not deigned to explain. But be it so, American decisions shall pass for nothing; there are no bounds to my complaisance for my adversary; every thing shall be yielded to him; titles in Louisiana shall be decided by the laws of England, not as those laws are understood in the United States, as they are expounded by the ignorant men who preside in their courts, but as they flow from the fountain head in good old England itself, and not even there as they are given to us by such inaccurate writers as Blackstone or Coke, who deal in general principles, but we will look for *decisions*, and those relating not only to land, but to land in a *city*, nay, more, to land in a *port;* and to bring the case still nearer home, to a *beach* which is covered not *once* every *six months*, but *twice every day*, with the water not of a river but of the sea, and on which *ships*, not Kentucky boats, ride at anchor. Thus far I shall be enabled to go, but I candidly confess I can get no farther, and if it should be objected to me that my property is chiefly loam and vegetable soil, and that in the case I cite the soil was sea sand, that my alluvion was produced by fresh water, and the English one by salt, or any other distinction equally important should be raised, I confess that I must give up the cause in despair, and avow myself vanquished by the superior resources of my opponent. Let us however do what we can.

I live in a place where there are very few English law books; my means of information therefore are but scanty. I cannot pro-

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cure the book from which Mr. Jefferson takes his Scotch case,* and I must therefore take it precisely as he gives it, which (he will pardon me) since the Spanish translation (mentioned above, p. 123.), I am rather loth to do—but even in that statement I think enough may be discovered to prove the truth of my position. Smart was the proprietor of a lot in the borough of Dundee, which was bounded *per fluxum maris* or by high-water mark, but the whole soil below high-water mark, together with the franchise, had been granted to the corporation of Dundee. The king, who owned the whole, had given that part above high-water mark to Smart, and all below it including the river on both sides, to the corporation. The lands gained by the recess then belonged to the corporation, not to Smart, because the space between high and low-water mark belonged to them. Smart was not the riparian proprietor, what was added by alluvion was not to his soil, but to that of the corporation, and this would have taken place were the lands situated in or out of a town. If, instead of granting them to the corporation, the king had granted the lands between high and low-water mark to an individual, that individual would have shut out Smart, and reaped the benefit of the alluvion;—for let it be remembered that by the laws of England the king is, *primâ facie*, the owner of all land between high and low-water mark, both on the sea coast and the arms of the sea. "The shore is that ground that is between the ordinary high-water and low-water mark, this doth *primâ facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea." Hargrave's Law Tracts, p. 12.—Although the same author adds that such shore may and commonly is parcel of the manor adjacent, and so may belong to a subject.—Now in the case relied on by Mr. Jefferson, Smart's grant was bounded by high-water mark, and the soil which the king had granted to the corporation of Dundee, lay between it and the channel, or perhaps included the channel itself. The corporation therefore took the alluvion, because they, not Smart, were the riparian proprietors, and as the land lay in a *town*, I might tell Mr. Jefferson that his note has

* 8 *Brown. Parl. Cas.* Smart v. Dundee.

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furnished me with the very case which his text had triumphantly told me it was impossible to produce.*

Though this case was introduced by my adversary as an illustration of the law of England, it will be no bar to his telling me, as I might him, that it arose and was decided in *Scotland*, and that it is not therefore a compliance with my engagement. Let us therefore try if we can find none in *England* itself.

In the book before cited, (Hargrave, 34) we have the case of an information filed against the tenant of lord Barclay, "setting forth that the river Severn was an arm of the sea, flowing and reflowing with salt water and was part of the ports of Gloucester and Bristol, and that the river had left about three hundred acres of ground near Shinbridge, and therefore they belonged to the king by his prerogative. Upon not guilty pleaded, the trial was at the Exchequer bar, by a very substantial jury of gentry and others of great value; upon the evidence it did appear by unquestionable proof that the Severn in the place in question was an arm of the sea; flowed and reflowed with salt water, was within and part of the ports of Bristol and Gloucester, and that within time of memory these were lands *newly gained* and inned from the Severn, and that the very *channel of the river* did within time of memory run *in that very place, where the land in question lies*, and that the Severn had deserted it, and that the channel did then run above a mile to the west."—On the other side the defendant claiming under the title of the lord Barclay alleged these matters whereon to ground his defence.

1. That the barons of Barclay were from the time of Henry the Second owners of the great manor of Barclay.

2. That the river of Severn was *usque ad filum aquæ*, time out memory, parcel of that manor.

3. That by the *constant custom of that country* the *filum aquæ* was the common boundary of the manors on either side of the river.

* I invite the reader to examine this case, for I strongly suspect that the only *quotation* which Mr. J. gives from it, and which he introduces with his expression "*the book says*", is nothing more than the marginal note of the purport of the case; generally the work of the editor, sometimes of the printer. If so, he might as well quote the index, but his expression would in that case have a *curiosa felicitas*—it would then, indeed, be the *book*, but not the author *which says*.

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"When this state of the evidence was opened, it was insisted upon that the river in question was an arm of the sea, a *royal river and a member of the king's port*, and therefore that it lay not in prescription to be part of a manor; but the Court *overruled that exception*, and admitted that even such a river though it be the king's in point of interest *primâ facie*, yet it may be by prescription and usage time out of mind parcel of a manor."—The defendant then went into his proofs, but as he was proceeding "The Court and king's attorney general, sir John Banks, and the rest of the king's counsel were so well satisfied with the defendant's title that they moved the defendant to consent to withdraw a juror, which, though he was very unwilling, yet at the earnest desire of the Court and the king's counsel he did agree thereunto." "So that matter (says the learned reporter) rested in peace, and the lands &c. are enjoyed by the lord Barclay and his farmers quietly and without the least pretence of title to this day"—"This I know, (adds he,) for I was thoroughly acquainted with this case, and attended at the bar at the trial," and I may draw my inference in his words—"This great and solemn trial for the right of a royal river *in a port and part of it* doth fully prove that which I had to say touching this matter."—It will scarcely be necessary to remark that though this case is one of a claim by prescription, it cannot be stronger than one like mine by grant. There was no prescription for the soil in question, that is expressly (in the case) stated to be "newly gained from the Severn," within the memory of man.—See also in the same book p. 56, 57, the case of Sutton Poole at Plymouth, where thirty acres of land were adjudged to belong to the king *as part of a manor*. The premises are thus described: "There lies adjacent to this town (Plymouth) within the Barbican there a space of about thirty acres which is *covered every tide with the sea, and ships ride there* and come to unlade at the keys of Plymouth.—This is mentioned, says lord Hale, the rather because the property was recovered by the crown, not" "*upon any prerogative title*," "but as parcel of land belonging to a manor *that once was a subject's*."

These cases I think must clearly evince that in England as well as in countries governed by the civil law the "whole bank and beach in towns are *not* necessary for public use" as our author has asserted, but are frequently vested in individuals,

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and that there is no more foundation in the common than in the civil law, for the distinction that has been made between *city* and *country* property on this subject.

I will now admit with Mr. Jefferson that in most instances in Europe and some in America, when towns have been established on public lands, the town lots have no right of alluvion; but the reason flows from the very principles I endeavour to establish, it is because the public is and individuals are not the riparious owner; all the land belonging to the sovereign, he grants lots by metes and bounds. These become *agri limitati* and are not entitled to the alluvion, but he, (the sovereign,) retaining that part bordering on the waters is the riparious proprietor, and he, therefore, or the corporation of the town if he grant it to them, (as in the case of Dundee) becomes entitled to the right of alluvion as an accessory to his riparious property.

Just so when a town is established on the lands of an individual; all the lots which he sells are bounded by the streets and have precise limits. The rest remains his property, and he retains it with all its accessories; should it be land bordering on a river, he has the right of alluvion, and should he lay out a street, the lots of which are bounded on the river, the grantees of those lots will enjoy the same right.

This is precisely Gravier's case; he owned the whole land to the water's edge, he laid out a part of that land into lots, bounding them by precise limits, and referring for those limits to the plan.—All that he did not sell he retained; in some instances he sold the batture with the lots, and by that act he bounded those lots on the river; in these cases the grantee is entitled to the alluvion; what he did not sell he of course retained, and was himself entitled to the increase.

But it seems to me rather an extraordinary idea that merely by selling some lots on a plantation and calling it a suburb, the proprietor should by a kind of legal legerdemain lose his property in a valuable tract, *which then existed* in front of those lots, and deprive himself of all the future increase. The existence of this land at the time of laying out the suburb is not only stated in the judgment, but is *expressly acknowledged* by one of the most able and zealous advocates for the title of the United States. Two of those gentlemen disagreed as to the principles on which their cause could be best defended, a very natural

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occurrence when the cause is not clear. One of them admitted candidly that Gravier's ancestors had a right to the alluvion not only by the French but the Spanish law; but very ingeniously attempted to destroy their title on other principles. This his fellow-labourer in the same field considered as a dereliction of the cause and says: " If that were true no resource would remain against Mr. Gravier but to prove that at the time of the establishment of the suburb, there was no portion of the batture sufficiently consolidated to be susceptible of being thus incorporated with the estate.—*But the contrary has been ascertained* and it is probable that it may still be proved."—Yet with the evidence of this admission before him, together with that of the affidavits which he so frequently quotes, all of which speak of its existence at a period long anterior to the establishment of the suburb; with all this before him, Mr. Jefferson affects to treat the property in question as a non-entity at that period, and speaking of Gravier as the owner of the *road only*, asks these sensible questions: " Did any one ever hear of a man's holding the bed of a road and nothing else?" " Is it possible to believe that B. G. in selling his lots *face au fleuve* really meant to retain the bed of the road and levée?" If this be fair honest reasoning, if this be a candid appeal to the public, if such subterfuges and concealments are admitted in argument, I have entertained very false ideas on the subject—nor could I conceive that the first magistrate of our country would rest the defence of his conduct on so poor an artifice as this! The alluvion could not accrue to Gravier, because Gravier had nothing after he sold his front lots, but the *road* and the *levée!* Mr. Jefferson tells us this, the same gentleman who told congress in enumerating and describing several parcels of ground in and near New Orleans, that there was beyond the levée a " parcel called the batture which had been *used immemorially* by the city to furnish earth for the streets &c. and as a landing or quay," &c. If it had been used *immemorially* by the city it must have existed when the suburb was laid out, and if it existed then, there was something besides *the road and the levée* for Gravier to retain, and Mr. Jefferson has put it upon the records of the nation that he knew this, and now he does not hesitate to argue to that very nation as if he disbelieved or had never heard of its existence.—But take away the batture and the argument will not be a whit the better. If Gravier owned

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the soil of the road, although the use of that road for the purpose of passage was in the public, the accessory would be his, subject, says Mr. Jefferson, to the same uses and servitudes—that is to say, that because the public have a right of way fixed by law to the breadth of forty feet over Gravier's land, when Gravier's land is increased to five hundred feet the *whole* shall be *road*. The use of such means of defence I believe will be considered as evidence of the most deplorable want of better materials. But even admit this, and what follows? Why, that the road, though five hundred feet wide, was still *Gravier's;* nothing gave it to the United States, and if he disturbed the public in the use of this broad way, the local authority would punish the offence, but the president acquired no right to seize upon it as lands belonging to the United States.

III. We are next presented with a new ground of defence, this land, which through forty pages of the book has figured as an alluvion, which has been seized upon because the laws of France *give alluvions to the king*, is now an alluvion no longer. Mr. Jefferson most manfully asserts, (page 42), that he "DOES *deny* to the batture *every characteristic* of an alluvion," and the process by which he supports this stout assertion is edifying and curious. Let us examine it with the attention so rare an operation deserves.

It is not alluvion: first, because the accession by alluvion must be *insensible;* and the increase of the batture may be perceived; every swell of six months "is said to deposit nearly a foot of mud, and when the waters retire, the increase is visible to every eye;" and "a single tide (meaning, I suppose, annual inundation) extended the batture from seventy-five to eighty feet into the river, and deposited on it from two to seven feet of mud." Here is indeed a rare discovery! If the increase can be perceived on the retiring of the waters, it is no alluvion; this takes away one of the first characteristics in his own definition. It must be *incrementum:* an augmentation, an increase; and if an increase, it must, of course, be perceived, it must be sensible to the eye after it is made, or it would never become the object either of property or discussion; yet according to our learned author, if we can see it after it is formed, it is not alluvion. I am astonished at so palpable an error, or so gross an attempt to mislead; it is found-

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ed on an ingenious contrivance of amalgamating all the words of different definitions, and from the mixture producing a *tertium quid*, to be found in neither. The word *insensibly*, is to be found in none of them, nor any equivalent word, in the sense in which Mr. J. employs it. It is "incrementum *latens*," a secret increase, that is hidden during its formation, as we gather from the remainder of the sentence:—"quod ita paulatim adjicitur, ut intelligi non possit, quantum quoquo *temporis momento* adjiciatur;"—"which is so gradually added, that we cannot know how much is added in *each moment of time*." All this relates to the process of formation. In order that it may cease to be alluvion, we must know, not how great the increase has been when the water has retired, but how much has been deposited in each *moment of time*. When Mr. Jefferson can solve this problem, as respects the batture, I will acknowledge that it is no alluvion;* but let him be the sponsor, and call it by any name he chuses. The truth is, and Mr. Jefferson well knew, and every man who has read a word on the subject must know, that this branch of the definition is to distinguish *alluvions* from *avulsions*,† or the sudden removal of large bodies of land by the force of a torrent, the law giving the latter to the proprietor from whose lands they were torn; and had Mr. Jefferson given the people of the United States credit for a particle of understanding, he would never have addressed to them so extraordinary an argument as that alluvion ceases to be alluvion, the moment you can discover to what extent it exists. Let us proceed with the trial of this *misnomer*, as our author calls it.

* This argument is not new; it was urged before, and I gave the following answer to it:— "When the ingenious counsel can analyze the different deposits, separate the sands of the red river, and the rich mould of the Missouri, from the clay and other various soils which the Mississippi receives from a thousand tributary streams—when he can dive into its turbid eddies, watch the *moment* of the precious deposit, and date the existence of each stratum of its increase—then this first branch of the authority he has cited, may be applicable to his cause."—It would be treating Mr. J. too much in the style he has most wittily and facetiously treated me, (p. 12.) to recommend a similar immersion to him.

† After defining alluvion as an *incrementum latens*, Vinnius adds, "Ex quo crescit hujus acquisitionis æquitas nimirum quod quæ alluvione accedunt ita lentè et obscurè detrahentur ut intelligi non possit, *si forte de his restituendis quæratur, quorum prius fuerint aut quibus detracta*."—Vinnii Com. in Inst. lib. 2. tit. 1, § 20.

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It is, secondly, no alluvion, because alluvion is created by "*apposition* of particles of earth;" but the batture has been created by *deposition*. Now the reader who wants to find this word in any of the definitions, either Latin, Greek, French, English or any other language, will be disappointed. It is created by a curious process, which is highly instructive. The original Latin is *incrementum latens;* here we find nothing about *apposition;* but this, we are told, has been translated by Theophilus into Greek, and that he calls it "*Prosklusis* and *Proschōsis*," which *prosklusis* and *proschōsis* are brought back again into Latin by Curtius, under the names of *adundatio* and *ad-aggeratio*. Here you see we have got *incrementum latens*, thanks to Theophilus and Curtius! back again into Latin; but so changed, that the father of the phrase himself would hardly know his child. But this is not all: the unfortunate word is not yet released from the torturing hands of these magicians; after the Latin comes the American conjuror—another metamorphosis is to be made; he creates two potent words for the purpose, and presents us with *adundation* and *ad-aggeration;* but as all his readers might not understand this new vocabulary, he changes *ad* into *ap*, *unda* into *posi*, and *adundation* becomes *apposition;* and thus *incrementum latens* having gone through the hands of Theophilus, Curtius and Jefferson, comes out, "*apposition of particles of earth.*" I am deceived if there was ever a more ingenious process; a troublesome word in a definition or a text, may, by the aid of a few translations and re-translations, be made to mean any thing we please; and the instance stated in the note, shews that it has once before been applied with success to effect a change of name.* It is unfortunate too for our author, that none of these

* An unfortunate Scotchman, whose name was *Feyerston*, was obliged, in pursuit of fortune, to settle among some Germans in the western part of New York. They made a much better *proschōsis* than Theophilus did; they translated him *literally* into German, and called him *Feuerstein*. On his return to an English neighbourhood, his new acquaintances discovered that *Feuerstein* in German meant *Flint* in English. They re-translated instead of restoring his name, and the descendants of *Feyerston* go by the name of *Flint* to this day.—I ought however to except one of his grand-sons, who settled at the Acadian coast, on the Mississippi, whose name underwent the fate of the rest of the family: he was called by a literal translation into French, "*Pierre à fusil;*" and his eldest son returning to the family clan, underwent another *prosklusis*, and was called *Peter Gun*.

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terms, either in Greek or Latin, have the meaning he has given them. I speak of *apposition*, which being English, I understand; as for *adundation* and *ad-aggeration*, which he has formed by adding an *n* to the Latin termination, as this does not, I think, give them a legitimate place in our language, I must consider them still as Latin, and tell Mr. Jefferson, which I do with great deference, that the first means simply *alluvion*, (see Godfrey, note on Dig. 41. 1. 7.) and the second means the action of heaping up, of raising a mound, and is derived from *ad* and *aggero*, which last word comes from *agger*, an accumulation, a mound, an heap of earth, not *ager*, a field. *Agger arenæ*, Virg. an heap of sand: so that if alluvion is *ad-aggeratio*, it is a *de*position, not an *ap*position. The other word, *adundatio*, conveys, from its etymology, the idea, that the increase was made by the action of the water; so that the whole of this translation and re-translation is perfectly labour lost; and even with the aid of Theophilus and Curtius to boot, we cannot make alluvion to mean *ap*position of particles of earth. Indeed, the idea is one of the most extraordinary that are to be met with in this extraordinary book. That the river is to *plaster* the sand, upon a perpendicular bank, as the mason plasters the walls of a chamber, and that it must adhere there, or it loses its name, it is no alluvion*—what shall we say to such fancies? That they are more ridiculous, but intrinsically quite as good as any of the other reasons that have been urged by our author in justification of his condnct.

Thirdly, we are told it is no alluvion, because it is not formed *against* the adjoining *field*, so as to make a *part of it*. Throwing the quibble on the word *field* out of the question, I would ask, how it is proved that this increase is not consolidated with the adjacent land? In the first place, we are presented with the levée and road, as forming a breach in the "continuity;" but as I have shewn that the road and the levée are *land*, and that land the *property* of the person under whom I claim, they do not break the continuity; on the contrary they preserve it. Next, "There is no extension of its surface, so as to form one with the former surface, so as to be a continuation of that surface, so

* The deposition of earth on the bottom of a river, can no more be said to be an apposition to its sides, than the coating the floor of a room can be said to be plastering its walls.—*Jeff.* p. 44.

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as to be arable like that." I quote literally here; because being not quite certain that I understand what is meant, I wish my reader t judge for himself. *No extension of a surface so as to form one with a former surface, so as to be a continuation of it, so as to be arable like it!* If by former surface, is meant the former surface of the batture, I agree with Mr. J. it does not form *one with it*, it is not a *continuation of it;* because the present surface is some feet higher than the former was many years ago; but then I do not see how this can be required as the characteristic of a species of property, which only grows into existence by yearly changing its former surface. He must mean by former surface, that of the land to which the alluvion is annexed; but on this supposition, I am equally at a loss to understand the phrase; he does not surely mean to present us here again with the idea, that the extension of the surface was broken by the road and the levee, because this last argument is introduced by the words, "even supposing the continuity not to be broken by the intervention" of these objects. Taking away then the levee and the road, what is there to prevent the extension of the surface? what other object intervenes to interrupt it? None: for we are told in the next sentence, that it *abuts against the bank;* if so, there is a continuity of surface; nor is it interrupted even if the fact were true as asserted, that this surface "is below the level of the *adjacent field:*"* unless our learned author will call on Theophilus and Curtius, to help him to a new feature in his definition, and require all alluvions to be on a *level* with the adjacent field. Without their aid we are however presented with a new one:—"*It* (the batture) *is not arable like it,*" (the *former* surface) meaning always, I presume, the original soil. To be alluvion then, it must be arable land; pasture land, meadow land, wood land, will not do. It must be *arable*, and arable *like;* that is, I suppose, in the same manner with the original soil. But how if the original soil be not arable? How if it be woodland? must the alluvion, to be alluvion, be *like* it in this respect also? Must it start out of the bosom of the waters,

* Observe here how our author has unwittingly done homage to truth, and contradicted his own sophisms on the word *ager*, by calling the property to which he denied any of the characteristics of this word, the *adjacent field.*

False reasoners, as well as others of a worse description, should have good memories.

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covered with full grown trees, that it may make, "*un tout avec la terre voisine?*" How if the alluvion should unfortunately, as it some times is, be composed of *barren sand?* Can no property be acquired in it? Must it be, as our author tells us, "fit for the the same use?" and if the alluvion, annexed to my cane-field, cannot produce canes, am I forbid to pasture it? What shall we say to this train of reasoning? What shall we think of the cause, that obliges a man of the late president's standing to recur to such arguments? If they provoke a smile even from the man who has been ruined by their application, certainly no indiffetent reader can peruse them, without a broader expression of mirth.

Having shewn how utterly inconclusive Mr. Jefferson's reasoning is, even on his own statement of facts, I pray the reader to cast his eyes on the levels contained in plate No. 1, fig. 2, and he will find that a very great proportion of the property in question, is *as high as any* part of the original soil in its natural state; and that all of the alluvion, to within a few feet of the river, is much higher than all that part of the plantation back of the lots; that is to say, higher than three fourths of the original soil.

Let me desire him to remember Mr. Derbigny's acknowledgement, that IT HAD BEEN ASCERTAINED, "that at the time of the establishment of the suburb, a portion of the batture had been sufficiently consolidated, to be susceptible of being incorporated with their (the Graviers') estate."

Let me refer to Mr. Jefferson's own acknowledgement of the fact, (p. 61) that at a very *early period* it was so far consolidated, that buildings were erected thereon, which the Spanish Governor ordered to be pulled down.

Let me invoke the judgment of the superior Court deciding this fact, that "from the evidence in the cause it appeared, that antecedent to the time when Bertrand Gravier ceased to be the proprietor of the land adjacent to the high road, a batture or alluvion had been formed adjoining the levee, in front of the Fauxbourg, and extending the whole length of the Fauxbourg upon the river; and that this alluvion *was then of sufficient height to be considered private property*, and had consequently become annexed to, and incorporated with the inheritance of Bertrand Gravier."

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And let me ask any unprejudiced man in which we are to place the most confidence, Mr. Jefferson's assertion of fact, or his deductions of law?

Having shewn in the most satisfactory manner, as he thinks, that this property is not alluvion, he kindly undertakes to tell what it is.—And what, courteous reader, do you suppose it may be?—Nothing else than a part of the *bed;*—yea, of the very *bed* and *bottom** of the river Mississippi. In support of this strange assertion we are again favoured with a great deal of etymological learning; but as usual with our author, much of it false, and all inapplicable. The Romans, in defining the word river, said that it consisted of "banks, a bed and water." The moderns it seems, with greater accuracy, distinguish, by an appropriate name, that "*band*" which lies between high and low water mark. This Mr. Jefferson says is part of the *bed* of the river; in English it is called *beach*, which is derived from the Anglo-Saxon *beotian*,† to beat—

In Spanish *playa*,
In Italian *piaggia*, } from the Greek *plaga*, a stroke.
In French, *plage*,

* Mr. J. makes use indifferently of these two expressions. "The deposition of earth on the *bottom* of a river, &c. p. 44. And in his Message to Congress, of the 7th of March, 1808, he describes the batture to be 'a shoal or elevation of the *bottom* of the river.'

† Our author is very careful to inform us that this word must be pronounced *beachian:* it is a necessary caution; some wicked punster might otherwise pronounce it as it is written, beotian, and apply it to an etymological research, in the maze of which a great genius had been bewildered. I will not assert, that this Saxon word is manufactured for the occasion, because I have not the means here of ascertaining the fact: but I strongly suspect it; and for this reason: Johnson derives the word *beat*, not from *beatian*, as I think he would have done, had that obvious root existed, but from the French *battre;* and this last word, the Dictionaire de Trevoux derives from the Latin *batuo.*—Since writing the above note, I have been favoured with an extract from Hickes's Anglo-Saxon Grammar, in which the English verb *to beat*, is rendered *betan*, and *beotan;* the *i* it seems has been introduced, to give some colour for making it the root of *beach;* because, according to Mr. Jefferson, it is very clear that the Anglo Saxons had adopted Dr. Sheridan's rules of pronunciation, and that their German idiom was sounded exactly like the modern English; and therefore, the word *beatian* or *beotian*, must, in the time of king Ethelwolf, have been pronounced *beachian*, precisely as the words *christian, fustian, question*, are now pronounced *christchian, fuschian, queschian*, &c. See Jeff. p. 45.

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Batture also comes from *battre*, to *beat;* therefore *batture* means a *beach;* therefore it is not *alluvion*, which was to be demonstrated. By the very same process I could prove it to be a battery, a battalion, a battering ram, or any other object derived from the same root. But in the first place, *batture* is not a *beach;* it is a term to be found in none of the editions of the French Dictionary of the academy, up to Smitt's inclusive, in the year 1799. It is, however, a word in general use on the Mississippi, and has a meaning here, as well defined as any other in the language. Of this Mr. J. had he been inclined to manage this controversy with the dignity which became his station, and even with the candor necessary to preserve appearances, would have acknowledged; because he knew, that until he suggested the quibble of calling it a *shoal*, all those engaged in the controversy called it an *alluvion*, and defended the public right to it as such. To prove this, take the first page of that very Opinion on which Mr. Jefferson grounded all his proceedings; that very Opinion with which the attorney general says his coincided—the Opinion of Mr. Derbigny:—

"Having considered the above statement of the case, together with the documents relative to the *batture* or *alluvion* there referred to, and the testimony heard in the suit between Jean Gravier and the corporation of New Orleans."

"The undersigned counsel is of opinion that the said *batture* or *alluvion*, is a property formerly royal, which passed from the crown of France to that of Spain, and belongs at present to the United States."

"This opinion is founded on the following reasons:

"1st. *Alluvions* on navigable rivers belonged to the king of France.

"2dly. The plantation bordering on the limits of the city of New Orleans was sold by the king of France in 1763, when the *alluvion situate in front of that land* was already in being.

"3dly. Between the *alluvion* and the land sold, lay a royal road (the same that still exists) and a levée, both which were then and have still remained public property.

"4thly. The *alluvion in question* has never ceased to be a royal property, the enjoyment of which the French and Spanish governments at all times left to the public, and on which they constantly hindered private individuals from encroaching.

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"5thly. Neither Jean Gravier nor those from whom he derives his title, ever were in possession of the *alluvion;* and Bertrand Gravier himself, at the time of his settling a suburb in front of his plantation, declared that he had no claim to the *alluvion.*"

Here, I think, is abundant testimony that *batture* and *alluvion* were at one period at least of the controversy considered as synonymous, and that too by a person better qualified to give the signification of a local term than an inhabitant of Virginia; and that its signification was not restrained to an alluvion covered with water during some part of the year, we learn from the same source, page xxvi. Mr. Derbigny says: "It is evident that when France ceded Louisiana to Spain, the right of the king of France to the property of all the alluvions then formed on the Mississippi was conveyed to the king of Spain, and that if the king of Spain had thought proper to avail himself of that title, he might have remained proprietor of all those new grounds.

"The king of Spain, through liberality towards his subjects, left the inhabitants of the borders of the river, in general, the quiet enjoyment of those new grounds; and for the encouragement of agriculture in this colony, which was as yet in its infancy, he constantly permitted them to be converted into cultivated fields, not even at any time hindering the proprietors of plantations in front of which they were formed, from altering the site of the high road, in order to take possession of them. Hence it follows *that the battures already formed* at the period of the cession of this colony to Spain are now become the property of the riparious inhabitants by right of long possession, as securely as those formed since are their property by the Spanish laws."

Here, certainly, is the strongest evidence of a notorious fact, that *batture* in the common parlance of the country means that part of the land which has been gained from the river, even after it has been diked in and reclaimed; and it is equally notorious, that in inquiring the value of a plantation, the first question is: Is it *batture* or *écor?*—the first designating those lands which are increasing by the action of the river, the last those that are losing by it;—and this, I repeat, Mr. Jefferson knew. Let us, however, proceed with his etymological proof.

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I have shewn that *batture* does not mean "*that band or margin of the bed of the* RIVER *which lies betwixt high and low-water mark.*"—Do the other words which he has supposed to be derived from the same root designate that idea?

Plage in the French, is derived, says the Dictionaire de Trévoux, from the Latin *plaga*, from the Greek *plax*, *plagos*, *flat*, *smooth;* and to a similar source may be traced the French word *platin*, which also means *beach*, and which Mr. Jefferson would fain derive from the Greek *plettein*, percutere, to strike; but afterwards confesses with a *perhaps*, that it may originate from the French *plat*, flat. Jefferson, 45. Whatever may be its derivation, it does not signify the shore between high and low-water mark, but that part of it above the reach of the wave. "*Plage* rivage, de la mer plat et *découvert.*" Shore of the sea flat and *uncovered.* Dict. Acad.

Playa in Spanish has the same signification, and is translated by the word *plage* in French. And *piaggia* goes further still, for it is "a strand or *high shore.*" Barettis' Dict.

So that if Mr. J. will have the batturé to mean *plage*, *playa*, or *piaggia*, we find that so far from signifying the *band or margin* which lies *below* high-water mark, its meaning is expressly the contrary, and that in Italy, Spain and France, it lies out of the water's reach. Was the member of the National Institute ignorant of the signification of these terms, when he employed them? or did the upright republican magistrate strive to deceive his *masters* by the misuse of foreign terms, when he was shewing them that "*their servant had done his duty*"?

It is not therefore extraordinary that Mr. Jefferson could find in Latin "no term which applies exactly to the *beach* of a *river.*" A faithful translation was all that was wanted to shew that he would find it in no language, in none at least of those he has quoted, or of the very few others with which I am acquainted.

But, though they happen to be in my favour, I am ashamed of these cobweb arguments, half hidden in the darkest nook of antiquity. Their texture can only be discovered through the *night-glass* of the etymologist, and then so doubtfully and obscurely that no certain conclusions can be drawn from the research; and I should be extremely sorry that my case were to depend on shewing that *beach* is derived from *beachian* or *beo-*

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tian, or *plage* from *plegeis*. Upon the whole, I dismiss the chapter of etymologies by referring the reader to Swift's ingenious attempt to shew from the names of Homer's heroes, that the English language was spoken at the siege of Troy; and I apply to Mr. Jefferson on this point what Johnson says of Wallis, that "his derivations are so made that by the same license any language may be deduced from any other."*

The object of all this research is to shew that the property in question, lying between high and low-water mark, is part of the *bed*, not part of the *bank* of the river, that the bed of the river is *public property*, and that consequently this belongs to the public.—But has he forgotten, or does he think that his readers have forgotten, that the bed of the river is only public while covered with water—that it is not a public property in the soil, but only a public use—a servitude of navigation. "Riparum quoque *usus* publicus est jure gentium sicut *ipsius fluminis*." "*The use* of banks is public in the *same manner* as that of *the river itself*." Inst. Lib. 2. Tit. 1. s. 4.

See also Vinnius' Commentary on this passage.

But as soon as the water is removed, the *bed* becomes the property of the adjacent proprietor, according to the following, among other, authorities:—"Quod si toto naturali alveo relicto, flumen alias fluere cæperit: prior quidem alveus eorum est qui propè ripam prædia possident."—"If the river, leaving its natural bed, shall flow in another channel, the former channel is the property of those who own the land on the banks." Dig. 41. 1. 7. § 5.—The same provision is made by the Law of the Partidas, 3d part, tit. 28, law 31, almost in the same words:—"Mudanse los rios de los lugares por do suelen correr, e fazen sus cursos por otros lugares nuevamente, e finca en seco aquello por do solian correr: e porque puede acaecer contiendas, cuyo deve ser aquello, que assi finca, dezimos que deve ser de aquellos, a cuyas heredades se ayunta; tomando cada uno en ello tanta parte, quanta es la frontera de la su heredad de contra el rio.

* I have heard of an etymologist who derived the name of the river *Potomac* from the Greek *Potamos*. This derivation is quite as probable as that of *beach* from *beotian*; being founded on a much greater similarity of sound, as well as analogy of sense.

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E las otras heredades por do corre nuevamente, pierden el señorio dellas aquellos cuyos eran, quanto en aquello por do corren: e dende adelante comiença a ser de tal natura, como el otro lugar por do solia correr, e tornase publico assi como el rio."

And to come to the law of France, which it is said must be the criterion, we have, on this particular point, first, the opinion of the tribunal of Rouen, above quoted, "that the *river itself* is not a *national domaine*, but a thing of which the public have *the use*. It belongs to the nation, not in full property, but as an appendage of its sovereignty;" and conformably with these principles, we have the following decisions:—

"Il a été rendu depuis peu d'années (say the parliament of Bordeaux, in one of their Remonstrances) quatre arrêts solemnels du conseil de la grande direction, par lesquels il a été jugé que des terrains près des bords des rivières affluentes à la mer, et *couverts périodiquement par les eaux de ces rivieres, lors du flux et reflux*, ne font pas partie des rivages de la mer, et qu'ils appartiennent en toute propriété aux particuliers qui les possèdent; les deux premiers de ces arrêts des 6 Août. et 13 Dec. 1771, ont declaré patrimoniaux les marais et grèves* d'Apdeville et d'Amfreville sur lesquels le *flux de la mer se porte régulièrement dans les hautes marées*. Le troisième du 27 Juillet, 1778, rendu au profit du seigneur et des habitants de Salnelle a annullé une concession, surprise en 1765, du marais ou commun de Salnelle, situé sur la riviere d'Orne, *qui est baigné périodiquement par les eaux de cette riviere dans les hautes marées* et ce, nonobstant deux arrêts du conseil des finances par les quels ce seigneur et ces habitants avaient été déboutés de leurs oppositions à cette concession.—Le quatrieme du 12 Août. 1782, sans s'arreter à des fins de non-recevoir proposées par le Marquis de Courcy, concessionnaire, a ordonné l'exécution d'un arrêt du 21 Mars, 1770, qui avait déclaré la concession obreptice et subreptice, et avait jugé que la grève de Brevart n'était pas un bord et rivage de la mer, *quoique le grand flot de Mars*

* Lieu uni et plat, couvert de gravier et de sable, le long de la mer ou d'une grande rivière. *Dict. Acad.*—A smooth or flat surface, covered with gravel or sand, along the sea or a great river.

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s'y portât. Ces quatre arrêts sont cités dans un mémoire imprimé, présenté au conseil dans l'affaire entre Monseigneur le Comte d'Artois, le sieur Tardif de Mondesir, les héritiers Lahouger et autres parties."— "Four solemn judgments have been had, within a few years, in the council of the *grande direction:* by which it has been decided, that lands, situate near the banks of rivers flowing into the sea, and *covered, periodically, by the waters of these rivers*, at the time of the flux and reflux, are not a part of the strand of the sea, and that they belong to the individuals who possess and improve them. The two first of these judgments, of the sixth of August and thirteenth of December, 1771, adjudge, as estates of inheritance, the meadows and beach of Apdeville and Amfreville, *which are covered regularly by the flux of the sea in high tides.* The third, of the twenty-seventh of July, 1778, given in favour of the lord and inhabitants of Salnelle, annulled a concession, obtained in the year 1765, of the meadows or commons of Salnelle, situate on the river Orne, *which are covered, periodically, by the waters of that river, in the high tides*; and this, notwithstanding two sentences of the council of the finances, by which this lord and the inhabitants, had been foiled in their opposition to this concession."

"The fourth, of the twelfth of August, 1782, notwithstanding the pleas in bar, offered by the marquis of Courcy, the grantee, ordered the execution of a sentence of the parliament of Rouen, of the eleventh of March, 1770, which had declared the concession surreptitiously obtained, and had adjudged, that the beach (grève) of Brevart, was not a strand or shore of the sea, *although it was covered by the spring tides*, and, consequently, maintained the lord and inhabitants in their possession."— These four judgments are cited in a printed memorial, presented to the council, in the suit between the count d'Artois, the sieur Tardif de Mondesir, and others.

Let me now bring to the recollection of the reader, the description of the premises in the decisive Bordeaux case. They are said to be, "les bords ou le *rivage* de la rivière de Gironde;" and it is expressly stated, that "ils sont atteints par celles (les eaux) que la rivière y porte dans les grandes marées;"—"the banks or beach (strand) of the river Gironde, which are reached by the waters which the river carries there in high tides."— Now the object in dispute in all these cases, was precisely Mr.

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Jefferson's "*band* or *margin* of the bed of the river, which lies between high and low water mark;" yet the courts uniformly declare it to belong to the adjoining proprietors; and the king, in the last case, formally confesses, that he never had any title or pretension to property of this description.

But why multiply authorities, or cite decisions to refute what my adversary refutes for me himself, and shews by his own reasonings and definitions, to be wild, fanciful, I had almost said absurd.

He acknowledges that there is alluvial property, and that it must be formed by the "*apposition*" of particles of earth to the *adjacent field*, that is to say, to the field which is *adjacent to the river;* but if this *band* or *margin*, which he tells us, in the present case is two hundred and forty-seven yards wide—if this *band* or *margin* always separates the field from the river, how is it *adjacent?* or in what manner can the particles of earth be transported across this margin, so as to be *plastered* (as he terms it) against the banks? Let it be remembered, that this band, margin, or beach, lies between the highest periodical inundation and the lowest water; but as the water can carry nothing farther than itself extends, all its deposits, all its *appositions* must of course be on this margin; which being public, the soil deposited on it must be so too; and this *band*, *margin* or *beach*, however increased in height, would always exist to prevent the extension of the field one single line towards the river. The conclusion then would be, that there can be no alluvion; which is defined by our author himself to be, "*the extension of the field added by the waters.*" This new-fangled idea, then, would utterly destroy the ground-work of his own definition; and the only part of it, as I have shewn, that is not as fanciful as his public property, in the aforesaid *band*, *margin* or *beach*.

The most curious part of all this reasoning is yet to come. The space between high and low water-mark is not part of the bank, but of the bed of the river. Why? because a bank is defined in the Roman law to be, that which *contains* the river when fullest —"Ripa ea putatur esse quæ plenissimum flumen continet;" and in the Spanish—"La ribera del rio se entiende todo lo que *cobre* el agua de el, quando mas crece en qualquiera tempo del año, sin salir de su yema y madre." Cur. Ph. The translation of which is,—"By the bank of the river we are to understand, all

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that *its water covers* when it is most swelled, without leaving its channel or bed." Now taking these two definitions together, and I allow them to be correct, what is the bank? That, says the first, which contains the fullest river; that, says the second, which the waters of the fullest river *cover*, when it does not overflow. Now I ask any man of common sense, whether these two definitions do not apply exactly to Mr. Jefferson's *bank*. What is it that contains the *fullest* river? The space between high and low water-mark. What contains the river at its lowest? That which is below low water-mark. What is *covered by the water of the river when most swelled?* Precisely the same space between the high and the low water-line. What is covered by the water of the river when it is not swelled? The bed, or that part which is below the low water-line. All above *low* water-mark, therefore, by the very words of his own authorities, is *bank;* and as he has been at great pains, with what success we shall presently see, to prove that this is the position of my property, he has proved it to be the *bank*, and not either the *bed* of the river or its *beach*.

I am here forced to remark a recurrence of one of the circumstances which render this controversy extremely unpleasant. Reasoning of every species I ought to be prepared to meet; if fair and unanswerable, I must yield to its force—if specious only, I must detect its sophistry. Of false reasoning, therefore, I ought not to complain; but I protest against false translations. They are destructive of the good faith which ought to reign even among the most virulent disputants; and deceive those, who confide as well in the author's integrity, as in his ability to render faithfully all the texts which he may cite. A single instance it would be uncandid to characterize thus seriously, even if it were important; frequent instances might be passed over in silence, if they were not very material; and both in the one and the other case, they might be ascribed to ignorance of the language, if the author did not profess an acquaintance with it, and, what is more important, if he had not before him faithful translations of the very passages he perverts. But when the false version is so important as to be made the basis of an argument, where it occurs more than once, and where the author not only understands the language, but is guided in the interpretation of the very passage, by an able and strenuous advocate in the same

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cause;* under such circumstances, I confess I can feel no indulgence, and admit of no excuse. Without the fear, therefore, of being deemed uncharitable, I proceed to detect a second attempt to impose on the public by a false translation from a language, little understood by the readers of his book.

Mr. Jefferson is endeavouring to prove that the space *between high and low-water mark* is not the *bank*, but the bed of the river. If he had told his English reader that the Spanish authority on which he most relies, declared "all that to be the *bank*, which was *covered* by the waters of the river in their highest swell;" he was well aware that he might have been answered, "Your authority proves the reverse of your proposition, the space between low and high-water mark being covered by the waters of the river, when at their highest swell, is precisely that which your authority calls the *bank;* how then can you tell me it is the *bed*?"—To avoid this difficulty our author, without scruple, changes the phrase in a material part, and translates the authority, so as to make it say, "The bank of a river is understood to be the whole of what *contains* its water when most swelled." The Latin and French authorities describing the shores of the sea (*littus*) admitted of a wretched quibble. Littus est *quousque* maximus fluctus a mare pervenit. Dig. 50. 16. 96.

Est autem littus maris *quatenùs* hibernus fluctus maximus excurrit. Ins. 2. 1. 3.

Sera reputé bord et rivage de la mer, tout ce qu'elle couvre et découvre pendant les nouvelles et pleines lunes, et *jusqu'où* le grand flot de mer cesse de se faire sentir. *Boucher.*

These passages all describe the shore to extend *as far as* the highest waves of the sea. This seems to be tolerably plain, and to define with sufficient certainty all that to be the shore of the sea which was sometimes covered with its waves; but Mr. Jefferson in his deductions reverses the sense of the phrase, though he translates it truly, and construes the *quousque*, the *quatenùs* and the *jusqu'où* to mean *down to.* That, according to him, is shore which lies *above* the high-water mark, all is bed *below* it. But the Spanish passage gave no reason for this fine spun construction, it expressed the same idea in other words and told

* Mr. Thierry (Exam. p. 17) thus translates this identical Spanish passage: "The *bank* of a river *comprises* all that its waters *cover*, when at their *highest* swell, at *any time* of the year whatever, without going out of its bed."

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——— Aut pingui flumine I
Cùm refluit *campis*, et jam se

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truly insinuates that we have "exaggerated the strong features of the Mississippi, have distinguished it from the other rivers of our country, and considered it as sui generis, not subject to the laws which govern other rivers, but needing a system of law for itself, until which system be prepared, it may be abandoned (he most pathetically adds) to speculations of death and destruc- tion like the present." It is unfortunate for our eloquent author that this fine flourish has nothing to support it; the Corinthian capital has neither shaft nor base. We have never founded any argument on the distinction between the Mississippi and other rivers—we have never said that it wanted a system of its own, or required time to prepare that system of laws.—On the con- trary we have always appealed to the laws established in *pari materia*, and have said that the proprietors of lands on the banks of the Mississippi have precisely the same rights with those of landholders bordering on other rivers, while Mr. Jef- ferson is himself the author or rather the copyist of those argu- ments which strive to establish a distinction—which class this river among non-descripts in geology, and characterise it as one which from the earliest ages existed without banks, until they were provided for it by the industry of man.—As however in this page (50) or rather in a part of it he seems to think it for the good of the nation *to assimilate all its parts, and to deal out law and justice to all by the same rule and the same measure*, I gladly avail myself of those favourable dispositions, and before we proceed to the next page, where we find them forgotten or abandoned, I close with the proposition, and claim the right of applying to the low lands of the Mississippi the principles which secure their property to the owners of the bottoms on the She- nandoah, the Potomac and James river, although those rivers once and perhaps oftener in a year cover them with their waters. —According to Mr. J., (p. 45), this annual swell is "*an annual* TIDE," and he says, *in the state in which he is*, that *tide* begins the first of November, rises until February, and then ebbs until April, when it is low water.—If it can be proved to me without the help of poetical quotations,* and without either *prostitu-*

* For instance, Mr. Jefferson, who is so fond of quoting *St. Evremont*, might, perhaps, refer me to his correspondent *Waller*, who, when he wanted a rhyme for "the river's *verdant side*," did not scruple to call the stream a tide. But I am not prepared to yield to such authorities.

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[illegible] of a river, either regular [illegible] above the flux of the sea, [illegible] I will give up all pretensions as [illegible] any knowledge of the language in [illegible] Jefferson himself in the very sentence [illegible] the improper use he makes of the term, [illegible] now of *tide* it is covered half the year [illegible] every day, the *tide* there being annual only, or [illegible] year." Which being rendered into [illegible] above the *tide*, that is where the tide [illegible] half the year.—Where such [illegible] with the language, it is easy to write vo- [illegible] to be understood or to convince. It is [illegible] author to speak English; if he [illegible] the Mississippi by its proper name, an [illegible] would be no room for all the fine-spun [illegible] it overflows [illegible] never yet was said to inundate or [illegible] upon I repeat, let Mr. Jefferson or his ad- [illegible] in which any man who understood [illegible] this called the annual or the occa- [illegible] river above the flux of the sea a *tide*, or [illegible] covered by them a *beach*, and I give up [illegible] done let them and him confess, [illegible] perversion of language, and an at- [illegible] readers, which betrays the contempt [illegible] understandings.

But the Mississippi had no banks from Bâton Rouge to the sea, until they were raised by the French settlers; nature had left this king of floods unprovided with them, until they were supplied by art. The first settlers lived in the *bed* of the river until they were numerous enough to raise levées. The grants of land were all void, for our learned author him[illegible] tells us, page 58, that though the bed of the river belon[illegible] king, "it cannot become the subject of *alienation*," and h[illegible] much patience in transcribing authorities to prove tha[illegible] it for public use. Instead then of conveying so much l[illegible] *banks* of the river, each of the early grants should [illegible] scribed so many acres in its *bottom*. And if the [illegible] that if I had not been driven from my pr[illegible]

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have been some feet under water; if this Attic observation were intended for argument, it is one that would apply to all the first settlers in the country before they had made their embankment.

The conclusion is as irresistible as the reasoning is luminous—"Wherever, therefore, the banks of the Mississippi have no high water-line, the objection is of no consequence, because the lands there are not yet reclaimed or inhabited; and wherever they are reclaimed, it is not true: for there a high water-line exists, to separate the private from public right."* This is verbatim our author's language;—the language of a lawyer, debating a question of title before an enlightened public, whom he thinks he can impose on by this wretched sophistry. The objection urged was, that if all was bed of the river, under what he calls high water-mark, then the whole country was bed of the river, because the river overflowed the whole; and to this he answers, your objection is of no consequence, where the artificial bank has not been made, because the lands are not *reclaimed* or *inhabited*. But the question is not, whether I inhabit or cultivate any land, but whether I own it—not what use I mean to make or can make of it, but whether it be mine or yours. You seize my property, saying it belongs to you; and when I complain of the act, you undertake to prove it yours, and think you have done so by asserting, that I do not "yet *reclaim* or *inhabit* it." Excellent logic! profound reasoning! In order, however, to have proved the objection to have been of *no consequence*, it would have been well to have shewn, not only that the lands on the Mississippi, where there are no embankments, are neither *reclaimed* nor *inhabited*, but that they were not susceptible of ownership; for I humbly apprehend it is of *some consequence* to me to shew, that I may *own*, though I have not improved, a parcel of land, which by industry I may render useful hereafter. The second part of his conclusion, that where the lands are reclaimed the objection is not true, I [illegible] already answered; and he himself seems not to think it [illegible] ly established: for he tells us, it requires [illegible] nd this is given to us in a note of two [illegible] which the object seems to be, to [illegible] the Mississippi and the Nile, with [illegible] ns.† Of all his labours, this is the on[illegible] best; and it is the one most fatal to hi[illegible] e Tiber and the Nile, he says, are tran[illegible] ith perfect

* Jeff. p. 51.

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or *proschosis*, that the inundation of a river, either regular or irregular, annual or semi-annual, above the flux of the sea, was ever before called a *tide*, I will give up all pretensions as well to the property, as to any knowledge of the language in which we write; and Mr. Jefferson himself in the very sentence preceding this, evinces the improper use he makes of the term, for he says, "above the flow of *tide* it is covered half the year instead of half of every day, the *tide* there being annual only, or only one regular *tide* in a year." Which being rendered into English amounts to this: Above the *tide*, that is where the tide never comes, there is a *tide* for half the year.—Where such liberties are taken with the language, it is easy to write volumes, but difficult either to be understood or to convince. It is not, however, the interest of our author to speak English; if he called the overflowing of the Mississippi by its proper name, an annual inundation, there would be no room for all the fine-spun arguments he has used; a river inundates its banks, it overflows the fields in its vicinity, but it never yet was said to inundate or overflow its bed. Again I repeat, let Mr. Jefferson or his admirers shew me an instance, in which any man who understood the language has ever before this called the annual or the occasional inundation of a river above the flux of the sea a *tide*, or the lands occasionally covered by them a *beach*, and I give up the controversy. Until this is done let them and him confess, that this is an inadmissible perversion of language, and an attempt to impose upon his readers, which betrays the contempt he has for their understandings.

But the Mississippi had no banks from Bâton Rouge to the sea, until they were raised by the French settlers; nature had left this king of floods unprovided with them, until they were supplied by art. The first settlers lived in the *bed* of the river until they were numerous enough to raise levées. The grants of land were all void, for our learned author himself tells us, page 53, that though the bed of the river belongs to the king, "it *cannot become the subject of alienation*," and has shewn much patience in transcribing authorities to prove that he holds it for public use. Instead then of conveying so much land on the *banks* of the river, each of the early grants should have described so many acres in its *bottom*. And if the observation, p. 12—that if I had not been driven from my property I should

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have been some feet under water; if this Attic observation were intended for argument, it is one that would apply to all the first settlers in the country before they had made their embankment.

The conclusion is as irresistible as the reasoning is luminous—"Wherever, therefore, the banks of the Mississippi have no high water-line, the objection is of no consequence, because the lands there are not yet reclaimed or inhabited; and wherever they are reclaimed, it is not true: for there a high water-line exists, to separate the private from public right."* This is verbatim our author's language;—the language of a lawyer, debating a question of title before an enlightened public, whom he thinks he can impose on by this wretched sophistry. The objection urged was, that if all was bed of the river, under what he calls high water-mark, then the whole country was bed of the river, because the river overflowed the whole; and to this he answers, your objection is of no consequence, where the artificial bank has not been made, because the lands are not *reclaimed* or *inhabited*. But the question is not, whether I inhabit or cultivate any land, but whether I own it—not what use I mean to make or can make of it, but whether it be mine or yours. You seize my property, saying it belongs to you; and when I complain of the act, you undertake to prove it yours, and think you have done so by asserting, that I do not "yet *reclaim* or *inhabit* it." Excellent logic! profound reasoning! In order, however, to have proved the objection to have been of *no consequence*, it would have been well to have shewn, not only that the lands on the Mississippi, where there are no embankments, are neither *reclaimed* nor *inhabited*, but that they were not susceptible of ownership; for I humbly apprehend it is of *some consequence* to me to shew, that I may *own*, though I have not improved, a parcel of land, which by industry I may render useful hereafter. The second part of his conclusion, that where the lands are reclaimed the objection is not true, I have already answered; and he himself seems not to think it very firmly established: for he tells us, it requires further development; and this is given to us in a note of two pages, closely printed, of which the object seems to be, to establish an analogy between the Mississippi and the Nile, with respect to their inundations.† Of all his labours, this is the one in which he has succeeded best; and it is the one most fatal to his argument. "The laws of the Tiber and the Nile, he says, are transferred to the Mississippi with perfect

* Jeff. p. 51. † Ibid. *in note.*

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accordance." Here then we agree perfectly; and if we do not dispute about the laws of the Tiber and the Nile, our question is settled. Fortunately, I find all I wish to rely on adopted by my adversary, in the quotation from the Digest, which he was obliged to notice in our former publications.—

"Ripa autem ita rectè definietur id quod flumen continet naturalem rigorem cursus sui tenens; cæterùm, si quando vel imbribus, vel mari, vel quâ aliâ ratione ad tempus excrevit, ripas suas non mutat. Nemo denique dixit Nilum, qui incremento suo Ægyptum operit, ripas suas mutare vel ampliare, nam cum ad perpetuam sui mensuram redierit, ripæ alvei ejus muniendæ sunt."—"The bank may properly be thus defined: that which contains the river when flowing in its natural state.* But it does not change its banks when it is at times swelled, either by rain, by the sea, or from any other cause; for, no one *hath ever yet said, that the Nile, which covers* Egypt by its increase, has thereby changed or extended its banks; but when it has retired to its usual height, the banks of its channel may be secured."—Dig. 43. 12. 5.

Agreeing then both on our facts and our law, can we differ on the interpretation of it? It seems too plain to be misunderstood.—

"The bank is that which contains the water in its natural state." This seems pretty intelligible; but the law-giver knew the natural propensity of the human mind towards subtle refinements. Those who could dispute whether water was in its *natural state* when solid in winter, or fluid in summer, might well raise a question, whether the summer or the winter state of the river was the natural one. Therefore he adds, "but it does not change its banks when it is at times swelled† by rains, by the

* Literally, "*holding the natural rigor of its course.*"—

I do not adopt Mr. J's. translation of the word *rigorem*. From the context, it cannot mean "*direction.*" The legislator is drawing a distinction between the river when swelled by rain, &c. and when in its natural state; the *direction* therefore of the water, could have nothing to do with the subject.

† Mr. J. translates the word excrevit, "*overflowed;*" it signifies, as applied to water, *swelled, risen*. Excrescere et decrescere aqua dicitur, water is said to *rise* and *fall;* (Calvin's Dic. Jur.) and the Spanish passage from the *Curia Philipica*, which has been so much commented upon, even in Mr. Jefferson's incorrect translation, establishes a clear distinction between the *swelling* of the waters,

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sea, or from *any other cause.*" Here then the quibble is foreseen and detected. The *natural state* of a river is defined to be, that in which it is when neither swelled by the sea, by the rain, *or by any other cause;* and that which contains the river in this state, is declared to be its bank. Apply this to the lands in question. They are acknowledged to be uncovered during the six months, in which the river is not swelled by the rains and melted snows of the upper country. They contain the river during that period; they are therefore on its *bank.* Can any thing be clearer than this conclusion from facts on which we agree, and from law which we do not dispute, and which my adversary himself says must decide the controversy?

After precept, our text affords us the illustration of example; and an example, which we both again agree to be analogous to our case. "No one (says the law-giver) ever said that the Nile changed its banks when it overflowed." The Roman governors of Egypt, though they sometimes vexed the alluvial proprietors with taxes, had not made the ingenious discovery, that all the land covered by the inundation was the bed of the river. This, down to the day of Justinian, had *never been said;* and the same thing might be repeated until a legist arose, whose researches have put a stop to the "*Nemo denique dixit*" of future jurists; and has discovered, in contradiction to a text he acknowledges to be law, *that* to be the *bed* of the river, and not its *bank*, "which is covered only when the river is at times swelled by rain, or some other cause"

Before we quit Egypt,* I will state a difficulty into which my

and the *overflowing* of a river, when it defines the bank to be, "the whole of what contains its waters, or of what its waters cover *when most swelled, without leaving its bed or channel.*" (Jeff. p. 48.) The words "*leaving its bed and channel,*" clearly mean nothing else here, than *inundation,* or *overflowing* of the river; and the context evidently shews, that a river may be not only *swelled,* but *most swelled,* without *overflowing* or transgressing its natural bounds. But Mr. J. either lost sight himself, or wished his readers to lose sight of so plain and obvious a distinction. I will not undertake to decide between these two alternatives.

* In a sarcasm, of which I cannot feel the point, nor discover the wit, it is said, that I could not forget the flesh-pots of Egypt on my arrival in this country, which is facetiously called the land of Canaan. I know as little of its flesh-pots, as the late president seems to do of its laws. But I think, that when searching the Scriptures for unmeaning allusions, he might have discovered

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adversary has drawn himself; and if he escapes from it, I abandon my cause.

We have seen that he acknowledges, and indeed labours to establish, the analogy between the Mississippi and the Nile; and declares, that the *laws* of the one, are transferred to the other with *perfect accordance*.* If this be the case, and I can shew that the alluvions of this very river, this Nile, so perfectly analogous in physical features with the Mississippi, so perfectly subject to the same laws,—if I can shew that the alluvions formed by this river, belong to the adjacent proprietor, I then prove, by the confession of my adversary himself, that the alluvions of the Mississippi also, belong to the owner of the bank. Because, in both cases we have the *artificial* bank; in both cases the alluvial land must be formed between this bank and the river; and until reclaimed, must be annually inundated by the river, and form that *margin*, that *band*, which he tells us is essentially its bed.

Let us try whether this law can be found.—

Of three laws on the subject of alluvions, contained in the 41st title of the 7th book, in the Code, two relate to the alluvions of the Nile. The first directs, that those who are enriched by the inundation of that river, (meaning, as Gottfried tells us in his note on the passage, by *alluvion*) shall pay an increased tribute; and that those whose lands are washed away, shall have a deduction made from their taxes.

The second is more explicit. "By this law, which we ordain to be perpetual, we order, that whatever is acquired to the proprietor by alluvion, (either in EGYPT by the NILE, or in the other provinces by other rivers) shall neither be sold by the treasury, nor demanded by any, nor separately estimated."

Now, if the laws of the Nile are "applied to the Mississippi, with such *perfect accordance*" as he says and I agree to, what question is left between us? After having thus completely defeated his arguments, to shew that the *shore* or the *beach*, as he himself repeatedly calls it, is not the bed of the river, it would be nugatory to examine those, by which he endeavours to esta-

some precept to arrest him in the unholy career of first oppressing a fellow citizen, whom he was bound to protect, and then adding mockery to his other outrages.

* Page 52, *in note*.

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blish the property of the nation in the soil of that bed. The truth is, he expresses himself so indistinctly on this subject, that it is really difficult to discover his precise idea. The bed of the river, he says, "*belongs purely and simply*" to the sovereign, as the trustee for the nation; but then he acknowledges, "that it can not be his personal property, nor an object of revenue, but must be kept open for the free use of all the individuals of the nation." The latter part of this position is correct; but it is difficult to reconcile it with the first. If it belongs *purely* and *simply* to the sovereign, the individuals of the nation cannot have a right to use it; those terms exclude the idea of all participation of right.

The truth is, that, as we have seen in that branch of our argument, the bed of the river is private property when the river abandons it; but the public have a right to a free use of it while the river continues its course. The sovereign has no *property* in it; he is only bound, as conservator of the rights of his subjects, to see that no one usurps more of this common use than he is entitled to; or disturbs any other in the use of it; or renders it less fit for public purpose. He exercises the same right over a river that he does over a highway; of which it is allowed the soil may be private property.

The same thing may be said of the *banks* of navigable rivers, of which the use, for certain purposes, is in the public; and the proprietor cannot legally make any improvements on them which interfere with this use. The seven Latin pages which follow the 53d, contain this doctrine; it has been uniformly admitted on our side of the question; and most of the authorities cited, will be found in our publications. Why this display of false research is made, I know not; perhaps to induce a belief, that I contended for some right inconsistent with the use of the public; perhaps only to ornament the work, by a display of erudition; certainly not, however, from any necessity in the case; for the whole doctrine has, from the beginning, been unequivocally admitted. (Vide Report, *Gravier* v. *Corporation of N. Orleans*, p. 43. Examination, p. 41. Note F to the same, &c.)

I admit then, and have always admitted, that, as riparian proprietor, I could not legally project any work into the river that should injure its navigation, or erect any on its banks that should interfere with the use of the public; and I admit also, that on the 15th of February, 1808, twenty days after the presi-

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dent had violently seized my property, the territorial legislature passed a law, making it necessary to obtain the assent of a jury, before any levée should be made or finished. But I deny the truth of Mr. Jefferson's assertion, that prior to the passage of this law, the assent of either magistrate or jury was necessary, to enable any proprietor to advance his levée as he thought fit. NOT A SINGLE INSTANCE, from the first settlement of the country, to the 15th of February, 1808, can be produced, of any such license being either asked or given; and, as far as I can learn, but one since that period; although thousands of acres have been enclosed in the first period, and hundreds in the latter.

The Roman law, it is true, required that security should be given, that an intended work in the river, should not injure either public or private rights. But whatever the practice were in Rome, we have seen that in Louisiana no previous leave was asked; and I apprehend that the banks of the Tiber and the Nile, as well as those of the Mississippi, might be enclosed without any such permission, where no opposition was made. If the neighbours dreaded any injury, they might apply, under the law Mr. Jefferson has cited, for an injunction, and the proprietor could not then proceed without giving security. But we have express law, that if he *did* proceed, and no person applied under the interdict, it was too late, after he had finished his work, to complain. The very next section to those he has quoted, Dig. 43. 15. § 5, makes this provision:—"Etenim curandum fuit, ut eis *antè opus factum caveretur*, nam *post, opus factum*, persequendi hoc interdicto *nulla facultas superest, etiamsi quid damni postea datum fuerit:* sed lege Aquiliâ experiendum est."—"Moreover it was provided, that this remedy should be pursued prior to the finishing the work; because, after it is perfected, no remedy is given by suit under this interdict, although an injury should be suffered by it, but the party is left to his action under the Aquilian* law."

With what justice, then, is it made a ground of complaint against me, that I did not do that, which no other individual, since the first settlement of the country, had done, or was expect-

* The Aquilian law is the 2d title of the 9th book of the Digest, and gave a remedy for direct injuries to slaves, cattle, or other property.

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ed to do? Why should I alone ask for a license from the governor and the city council, which he is pleased to call the *proprætorian license*, when it was neither demanded by law, nor the usages of the country? Why should I give security, when nobody required it? Or how was I to "*carry my case before twelve brother riparians*," when I had been dispossessed twenty days prior to the passage of the law, which alone authorised me to do it. Yes, this vigilant guardian of the people's right, this upright magistrate, justifies himself for having given an order to dispossess me on the 30th of November, 1807, by saying, that I did not pursue a measure, which was only required and pointed out by a law passed in February, 1808.

Familiarized as I become, in the perusal of Mr. J.'s work, to extraordinary assertions, and to arguments arrayed against each other, I confess that I was not prepared for those which awaited me at the 63d page. "It must be noted, (we are told) that Mr. Livingston's works *were arrested* by the marshal and posse comitatus, by an order from the secretary of state, on the 25th of January, 1808; and that on the 15th of the ensuing month, the legislature took the business into the hands of their own government, by passing this act. From this moment, it was in *Mr. Livingston's power to resume his works*, by obtaining permission from the legal authority. The suspension of his works, therefore, by the general government, was only during these twenty-one days." I am at a loss here which to admire most, the hardihood with which the writer makes this unfounded assertion, or the inconsistency with which, in one line, he abandons all the former arguments of his book.

To give some colour to his assertion, that after the passage of the territorial law, I might have resumed my works by obtaining the permission required by that law, he has recourse to an equivocal expression, and says that they were *arrested* by the marshal, giving the idea, that I had simply been prevented from proceeding to erect a nuisance; when the truth is, that he not only arrested my works, but drove me from the property, took possession of it, and solemnly declared, that he took such possession, because the lands *belonged* to the United States. How, in the face of this declaration, this record, this official act,—how can he tell the world that I might have *resumed my works*, on obtaining the permission of a jury, according to this

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law? Could the jury, or the *prætorian or propræ̆torian* license, authorise me to deprive the marshal of the possession he had taken? Could the territorial legislature ever take the business into their own hands, while the claim of the United States subsisted? Had he not under his eye, at the time he wrote this extraordinary sentence, the law which declares, that the territorial legislature "shall have no power over the primary disposition of the soil; nor to interfere with the *claims of land* within the said territory?"* had he not himself sanctioned this law?

Could he have forgotten, that in his message to congress respecting this property, he tells them, that he "had taken measures to prevent any change in the state of things, and to keep the GROUND CLEAR OF INTRUDERS;" and desires them (the congress) to take measures for *settling the title?* He had driven me off as an INTRUDER on the 25th of January; he calls me so in the title of his book; he tells congress on the 7th of March, that he would "keep the ground clear of INTRUDERS;" and yet he very gravely tells me, and tells the world, that after the 15th of February, I might have "*resumed my works*," if a jury of twelve riparians had given their assent. Could the jury, I again ask, authorise me to commit, what he calls an *intrusion* on the lands of the United States? Could they counteract the measures he had taken to keep me *out of possession?* Nay, further, he tells this to ME, to whose respectful prayer to be reinstated in possession, he had replied on the 20th of May, that "the case of the batture being now referred to *Congress*, on the official opinion of the attorney general, that the RIGHT IS IN THE UNITED STATES, it is the DUTY of the president to *keep the ground clear of any adversary possession*, until they shall have decided on it."†

It was his duty to keep the ground clear of my possession, until congress should decide. Congress have not decided to this day; and yet, "the suspension of my works, by the general government, was only during these *twenty-one days!!*" If the assent of the jury was the only obstacle, why was I not referred to *them*, and not to *Congress*, when I petitioned to be put in possession? This is not all: not content, in the face of these declarations, to assert as a fact, that I might have resumed my works, in the page I have quoted, he refers again, page 76,

* Act of the 26 March 1804, sect. 4. Laws U. S. vol. vii. p. 114.

† Mr. Madison's letter, 20th of May, 1808.—*Livingston's Corresp.* p. 4.

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to this law; and again repeats, "that it gave me an easy mode of applying for permission to resume my enterprise; and that had I obtained a regular permission, certainly it would have been respected by the national executive;"—that is to say, the national executive would have given a property, which he believed to belong to the United States; a property, in the state of which he had pledged himself to suffer "*no change;*" a property he had solemnly engaged to keep "clear of *intrusion and adverse possession;*" he would have given this up to the intruder, if that intruder had procured the assent of twelve men, all intruders like himself; because they are all possessors of the "*bank*," which he has proved, to his own satisfaction, to be public property. Would he have done this? If he would, he deserves impeachment for his disregard of what he says is the right of the United States; if he would not, he deserves something worse for the unfounded assertion.

Whatever may be the truth of this allegation, as to my being permitted to take possession of and improve the property, it is, as I have stated, totally inconsistent with all the acts of the executive, with all the former arguments he has used to support them; and is a most formal and unequivocal abandonment of the title in the United States, on which the whole proceedings were founded. In order to place this in a true point of view, it may be necessary again to call the reader's attention to the commencement of this controversy, and the pretensions which were advanced by the president of the United States.

After John Gravier had, as we have seen, been quieted in his possession of the premises in question, after the claim of the corporation either to the land or to a servitude in it had been rejected by the final judgment of the superior court, the counsel for the corporation set up a title in the United States, and moved on that ground for a new trial; this being rejected, the corporation stated a case to their counsel, Mr. Derbigny, and abandoning all title for themselves ask whether "the United States have not a well founded and clear title to the property, as being part of the public demesne?" On this case Mr Derbigny gives a very ingenious opinion, which concludes thus: "The undersigned counsel concludes from the above discussion, that the United States are now the *real proprietors* of the *batture*, *accretion*, or *alluvion*, situate in front of the suburb St. Mary,

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and that if they claim it, the courts of justice cannot but acknowledge and confirm their TITLE." This is dated the 21st of August 1807, at New Orleans. It was sent on to Washington, and was made the basis of the memorable mandate of the 30th of November in the same year.—This mandate could only have been issued under the idea that the lands in question were the *property* of the United States; and we accordingly find that the instrument itself begins with reciting the title of an act made to enable the president to remove intruders from the *lands of the United States*, and declaring that the mandate was issued under that act, and that the property in question was land "*ceded to them.*"

Thus, in what preceded the act, as well as in the instrument which authorised it, we find it based upon an assertion that the *soil* belonged to the United States, that it was part of their demesne, that they were not its *guardians*, but according to the expression of the counsel, its "*real proprietors.*" After the act was done, we find this and this alone alleged to justify it. On my application to the president to be reinstated, he tells me he cannot do it; because the attorney general has given an opinion "that the *right* is in the United States," and this attorney general, when earnestly *pressed* to let me know what facts or documents were submitted to him as the case on which he gave his opinion, says explicitly, that he recollected *no other papers* than Mr. Derbigny's statement and opinion, and a letter from governor Claiborne mentioning that Mr. Moreau and Mr. Gurley concurred in it, and refers me only to a *coincidence in opinion with Mr. Derbigny*, not to any want of the pretorian license, or of the assent of a riparian jury. Now I ask whether the allegation that I might have resumed my works, on complying with the laws of local police in the territory, is not a most explicit and unequivocal abandonment of the claim of property in the United States, so solemnly asserted, so unconstitutionally enforced? Surely the instance before us is a proof of that loss of judgment, which in a bad cause leads to self-conviction. Falsely imputed by the Latin adage to the act of God, it arises from that natural confusion which obscures the best understanding, when employed in the defence of error, or the obstinate justification of wrong.—The mind that in a righteous cause could dictate those high sentiments of patriotism and eternal justice which ushered in our

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political existence, and announced it to the admiring nations of the earth;—that very mind tempted into an act of oppression, is debased by a desire to defend it, and in the execution is inconsistent, weak, and worse than all, persecuting and unjust.

IV. This leads to the fourth head of defence* which supposes the property mine, but alleges an use of it inconsistent with the laws of the territory. The documents to which I have before referred shew how ill-founded is this charge. But suppose it true, what justification does it form for Mr. Jefferson's interference?

He has shewn that if I were guilty of these attempts to drown and poison the city, there were laws not only to punish but restrain me. The ancient and modern provisions he has cited authorise the judge on the complaint of any individual interested, to issue his injunction against the erection of the work.

He has not only cited the law, but shewn that proceedings were had under it; he has told the public, that my works were presented by a grand jury as a nuisance.—Why was not that presentment followed up and tried? I could then before a jury of my country have shewn the falsity of all these charges. If they were true, a verdict which could have been had in ten days, would have put a stop to my "aggressions" as effectually as the mandate of the president, and I believe every one will allow with rather a greater attention to the forms of law. That a president of the United States is required or even authorised to watch over the police of the rivers or the cities in the territories; that he is to abate the nuisances in the suburbs of New Orleans, and determine the proper height and extent of the levées in the Mississippi; that he is to guard against the accumulation of the "putrefying mass with which I was to raise up the foundation of my embankment," appears to me rather derogatory to his station and incompatible with his other duties; I had thought that they fell within the province of a high constable or a scavenger, that the first magistrate of our nation had certain duties assigned to him by the constitution, which he was to perform without interfering with the internal regulations of territories or states, and that when he was authorised to ask the opinion of the great officers of government, it was not intended that he should degrade them by deliberating on the propriety

* See above, p. 146.

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of filling up a mud puddle, or pulling down a dyke in New Orleans.

Nec Deus intersit nisi dignus vindice nodus, Do not let Jupiter appear until his thunders are necessary, is a maxim, true as well in the common *prose* transactions of real life, as in the fictions of poetry. If my works were a nuisance, a court of quarter sessions with its sheriff, its constables and parish jury was a much more appropriate machinery, than the president of the United States assembling the council of the nation, drawing out its military force and lanching his thundering mandate at my unprotected head.

There is a real or affected ignorance of the first principles of our government, which runs through all this division of Mr. Jefferson's argument, that is degrading to the author in the first hypothesis, insulting to his readers in the second. The bed of the river and its shores belong, says his argument, to the public. The sovereign is the guardian of this public right, and though the soil of the bank may belong to an individual, it is the duty of the sovereign to take care that this right of private property yield to the public use. To this point he has cited Domat in p. 60. But in our government who is the sovereign? The executive head of the federation? or the local government, the state or territorial sovereignty? No man who understands the first rudiments of our constitution can hesitate on these questions; again, of the local government which branch? Every infraction of a public right is a public offence, and all these are to be punished by the intervention of the judiciary, a branch wholly distinct in our government from the executive, but which Mr. Jefferson has confounded with it in his principle, and has degraded by his practice.

The territorial government, for all the purposes of domestic rule, is as distinct from and as independent of the general government, as is that of the states. By the ordinance of 1787, which at the period of the transaction, formed the constitution of the territory of Orleans, there was a governor with executive power, a legislative council and house of representatives, with "authority to make laws in all cases for the good government of the district, not repugnant to the ordinance," or constitution, and a judiciary regularly organized. In short, a local government complete in all its parts, excluding as much any interference of the federal government, as those established in the

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states. The care, then, of all these public rights in the territory of Orleans, belonged exclusively to the proper branch of the local government, and the interference of the president of the United States was as unconstitutional under that pretence, as it would have been in New York or Massachusetts; and he might as well ord the marshal to call out his posse to destroy the weirs and floating nets in Hudson's river, or to cut down the wharves that project into its channel; he might as well, I repeat, order the demolition of Long Wharf, and direct the garrison of the castle to hold themselves in readiness for another Boston massacre, in case of resistance. He would be quite as justifiable in doing this as in doing what he has done, and he might use the same arguments with as much force in the one case as in the other.

That the right of interference resided in the territorial, not in the general government, is in effect acknowledged by our author himself, who tells us (p. 62) that "surely it is the *territorial legislature* which not only has the *power* but is under the *urgent duty* of providing regulations for the government of this river and its inhabitants," &c.—In the same page he tells us that "the governor and *cabildo* (municipal council) seem to have held this pretorian power in Louisiana, *as well as that of demolishing what was unlawfully erected*, and that the act of the legislature, without taking the power from the governor and city council, gives a concurrent power to the parish judge and jury," &c.—Here we have an express acknowledgment, nay more, a strong desire to establish a right in the *territorial legislature* to make laws on the subject in dispute, and in the territorial executive to carry them into execution—not only to prevent the erection of any nuisance, but to demolish it if erected.—If, then, this right both to legislate and execute was vested in the local government, what excuse has the president of the United States for his interference? In what part of the constitution does he find this concurrent right? What confused ideas, then, I repeat, must that man have of government who believes in this justification? What contemptuous ideas of the people to whom it is addressed must he entertain, who knowing its fallacy, thinks he can impose it on their understandings!

But supposing my works a nuisance, and the president of the United States to have the power to abate it, has he done so? Is

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that the act of which I complain? neither the one nor the other;—his order is not an order to demolish my works, to fill up my canal, to pull down my house, but *to remove* ME *from the possession of the land*"—and this was accordingly done; the canal which was to poison the city by its pestilential vapours was suffered to remain, and is resorted to at this day, although nearly choked up for want of cleaning and repair, as a more commodious and safe harbour for boats than any other near the city. The levée that projected into the river and was to "sweep away the town and country in undistinguished ruin," was not demolished by this vigilant abater of nuisances: it was left to the operation of time to effect. The house which impeded the navigation of the river, and interfered with the public right to its banks, was transferred to the possession of the city of New Orleans, and for several years was occupied as their guard-house. So that if the facts alleged in Mr. Jefferson's justification be true, and it was his duty to abate the nuisance, he has totally neglected it; he has suffered the nuisance to remain, but has dispossessed the owner of the land on which it was erected,—a new mode of procedure, and somewhat inconsistent with that eager desire to destroy these dangerous works, with that active zeal which could brook no delay to consult the forms of law. The truth is, that this idea of the abatement of a nuisance is a complete after-thought, never alluded to in the act or in any of the early stages of justification, suggested now by a faint hope to elude fair inquiry, and made of such stuff as are the arguments of a Newgate solicitor in defence of a felon caught in the *manour*.—To hide the thread-bare weakness of this argument it is glossed over with a mock heroic declamation, in which pestilence and fever, death, destruction, ruin and inundation, frighten the reader in every line, and in which he has reproached me with being afraid of submitting my cause to a jury. Mr. Jefferson reproaches me with this!—He whose constant care has been by demurrers, by pleas to the jurisdiction, by every device that chicane could invent to avoid this species of investigation; he, whose steady phalanx of friends in congress defeated every attempt to submit the cause to any species of trial!—He utters this reproach to me! who for five years have been constantly engaged in the painful unavailing task of solicitation for this *or any other trial*. Such an insulting disregard to propriety and truth, forces me from the modera-

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tion with which I wished, injured as I have been, to conduct the controversy; and the close of the passage now under review is calculated to inspire sentiments not only of indignation, but horror!

My life had been more than once threatened for exercising my legal rights. Emboldened by the idea of executive protection, excesses were committed in my case, which the love of order natural to the people of Louisiana had in every other instance avoided. The good sense of the people had got the better of this temporary frenzy; the necessity of submitting to the laws was perceived and acknowledged. Mr. Jefferson's friends must have informed him that these ideas began to prevail, and that if by a decree of the court, or in any other legal manner, I should recover my possession, there were now no hopes that I should be deprived of it by a mob. This was a prospect too mortifying to be endured, the people must be excited—the spirit of 1807 must be revived, and though the danger never existed, though if it existed it was long past, it must be painted in glowing colours, the vengeance of popular fury must be directed at my head; an expression in one of my letters, which it was thought would render me odious to the people, must be culled with malignant care—their conduct in opposing the laws must be spoken of with complacency, while mine in daring to complain is held up to the severest animadversions; and when by these arts a proper spirit is supposed to have been excited, they must be plainly told, that though their laws will not allow them to BURN me alive, it is a punishment mild enough for my offence!!

"What was to be done," says Mr. J., "with such an aggressor? Shall we answer in the words of the imperial edict?—*Let him be consumed* WITH FLAMES IN THAT SPOT *in which he violated the reverence of antiquity and the safety of the empire, let his accessaries and accomplices be cut off*," &c. "Our horror," he adds, "is not the less because our laws are more lenient." I ought perhaps only to laugh at the folly of this rhapsody, and remind the author that the flames were prepared by the Roman law for the *destroyers* of the dykes of the Nile, not for the one who erected them,—I ought to ask him good-naturedly to look at the title of his own law,* and determine which of us deserved

* De Nili aggeribus non *rumpendis*.

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the stake. But I confess that the mirth naturally excited by the absurdity, is somewhat repressed by horror at the wickedness of this attempt.

On these facts and on this law, the late president says "*We* were called and repeatedly and urgently called to decide." As I do not suppose a republican magistrate could assume the ridiculous expression of royalty, by speaking in the plural number, I must suppose that he has fallen into it by reflecting on the various capacities in which he was thus *urgently called on* to act. As LEGISLATOR, he was to make a new law to fit the circumstances of the case; as JUDGE, he was to apply it to those facts which as a JUROR he was to ascertain, and to pronounce that sentence which, as EXECUTIVE OFFICER, he was himself to carry into effect; as PRESIDENT, he was to reclaim the lands of the United States; as COMMANDER IN CHIEF of the armies, a sufficient *military force* was to be prepared to over-awe opposition; as MAYOR of the city of New Orleans, he was to enforce its rights against the decrees of the court; as HIGH CONSTABLE, he was to abate nuisances, and as STREET COMMISSIONER to remove the *putrefying* mass, that threatened the health of the city. We ought not to be astonished that an officer who thought himself obliged to act in all these capacities, should speak as if he were more than one, nor that having in this instance invested himself with all the characteristics of despotism, he should have assumed its style.

Having established what he calls the fact, and the law of the case, he proceeds to shew, that he had applied the proper remedies. These he classes under three heads:

1. "The right to abate nuisances."

2. "The right to resume by force, property which had been unlawfully taken."

3. "The act of Congress, of the 3d of March, 1807."*

1. I have anticipated the argument on the first head, and have shewn that there was no nuisance; that if there were, a competent local authority was provided to abate it; that the president of the United States, if he acted on this ground, acted unconstitutionally, and assumed the powers of inferior officers, in a manner derogatory to his dignity, and contrary to his duty; and finally that if it were a nuisance, and it were his duty to abate it, he did not perform this duty, but left the nuisance *in*

* 8 Laws U. S. p. 317.

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statu quo; and that the act complained of is not destroying the works, but depriving me of my possession.

2. The late president says, "every man has, by *natural law*, a right to retake by force his own property, taken from him by *force* or *fraud*." But as he acknowledges, that both by the civil and the common law, this right is restrained, I cannot see precisely the object of introducing it, any more than I can the dissertation on the right of recaption of personal chattels. The civil law and the common law, we agree, do not permit any individual to resume by force the possession of lands, although he may be the true owner. But this does not apply, it is said, to governments. Mr. Jefferson "believes, that *no nation* has ever yet restrained itself in the exercise of this right." He asserts the example of England as proof of this principle; but candidly allows, that he knows nothing of the Roman laws on the subject; which he says are, "immaterial, but *inasmuch* as they may be the law of the case in Louisiana." I am not sure that I understand this phrase. The late president's style is sometimes beyond my comprehension. I believe, however, he means to say, that the Roman law is material only, so far as it may be the rule to govern the case in Louisiana. Should this be what he means, I would ask, if it be the "*law of the case*" in Louisiana, is it not the only "*material*" rule? The case arose in Louisiana; and when I attempted to call Mr. Jefferson legally to account for his conduct in Virginia, he told me that I could sue only in Louisiana; that the rule which governs the case in Louisiana, must govern it every where, and be the only rule. The sentence I am considering, will amount then to this: *The Roman law is immaterial, but inasmuch as it is the only material rule.* Why this obscurity of expression? Why this confusion of ideas? Why all this from the pen of Jefferson? I have before hinted at the cause; it is no longer drawn in defence of truth; it is prostituted to the purposes of oppression!—it is employed in defence of error! The law of this country then, is the only object of enquiry. By becoming a territory of the United States, our laws were not changed; and by the terms of their compact with us, no man could be deprived of his property but "by the judgment of his peers, or the *law of the land*."* That law was unchanged by the transfer of

* Ordinance, 1787, transferred to the territory of Orleans, act 2d March, 1805.

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the country, was expressly preserved by the law of the 2d of March, 1788, and still remained as it was under the dominion of Spain. The United States, in all cases not legally provided for by their own laws, were, as to their property, bound by those of the territory; for the recovery of their debts, they were obliged to pursue the forms used in the territorial courts. The mode of enforcing payment by execution, was in their case, as in that of individuals, restricted by the local regulations.

So with respect to lands: the United States had the dominion of all those which had not been legally granted. The territorial legislature could neither tax nor dispose of them; but all questions, relative either to their conveyance or possession, were subject to the decision of the laws relative to other real property. What were these laws on the point in question? Could either an individual or the government take by force, a possession of which either had been deprived, even by force or fraud? They could not. By the civil law, every entry by force was prohibited; and the deforcior forfeited, by his illegal violence, any title he might have had; and an action was provided, by which any one ousted by force, could recover his possession, even if he had no title and the disseisor had one. This part of the Roman code, made a part of the Spanish law, which governed, and still governs, the state of Louisiana; and its provisions, contrary to Mr. J.'s assertion, expressly extended to the government.

1. The action for the recovery of possession, forcibly taken, is called the interdict, *undè vi;* of which the description from the Roman law is,

Hoc interdictum proponitur ei, qui vi dejectus est: etenim fuit æquissimum, vi dejecto subvenire, propter quod ad recuperandam possessionem interdictum hoc proponitur.—Dig. 43. 16. 1. § 1.	This action is given to him who is expelled by force; for justice requires, that we should aid those who are thus ejected; wherefore, for the recovery of their possession, this action is given.
Ne quid autem per vim admittatur, etiam *legibus Juliis** pros-	That nothing should be permitted to be taken by force is provid-

* This expression shews, that the civil law, respecting forcible entries, is at least as old as Julius Cæsar. *Juliæ leges*, as we learn from the learned Godfrey, was the term employed to distinguish the laws enacted by the Comitia in the last years of the republic.— "Nam comitia, quæ erant præcipua reipub-

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picitur publicorum et privatorum, nec non et constitutionibus principum.—ibid. § 2.

ed for, as well by the Julian laws, as by the imperial constitutions.

And see the whole of this title, *passim*, and the 8 Cod. 4. *undè vi*. These provisions are adopted and enforced by the laws of Spain.

Interdictum verò recuperandæ possessionis competit possessori per vim dejecto à sua possessione rei immobilis pro eâ recuperandâ, et vocatur *undè vi*. Textus est in lege 1. vers 1. Dig. *De vi et vi arm:* cujus verba sunt: *Hoc interdictum, &c.....*et natura, virtus et effectus hujus interdicti est, quod spoliatus restituatur in suam possessionem, et quod adversarius condemnetur in omni damno et interesse quod spoliatus prætenderit, etiam si excedat valorem ipsius rei."—Ant. Gom. in leges Tauri, p. 507.

The action for recovering "possession," lies for him who has been driven from the possession of his real estate, by force, for the recovery thereof; and it is called the *Interdictum undè vi*. The text is found in the Digest *De vi et vi arm. l.* 1. § 1. the words of which are, "*This interdict*" *&c. &c.* and the nature, force and effect of this action is, that the person ejected be restored to his possession; and that the defendant be condemned to pay all the damages he hath suffered, although they should exceed the value of the property.

2. The plea of title, is no bar to the recovery under this action.

Item adde, quod agenti interdicto *undè vi* non obstat *exceptio dominii;* imò ante omnia spoliatus est restituendus: undè si reus conventus excipiat de dominio, et offerat se incontinenti probare, non est audiendus; sed probatâ violentiâ, statim debet fieri restitutio.—Ant. Gom. de leg. Tauri, p. 508.

And moreover the plea of title is no bar in the action *undè vi*. But the person ousted, is first of all to be restored to his possession: and although the defendant plead title, and offer instantly to prove it, he shall not be heard; but the force being proved, restitution must be immediately awarded.

licæ liberæ insignia, sub Julio habita sunt, à quo et à cæteris magistratibus leges variæ veteri ritu rogatæ sunt, et ab ejus nomine quædam *Juliæ* dictæ sunt." Godf. Hist. Jur. Chron. p. 5.—Some other law, of the same import, must have existed at a much earlier period; for it is difficult to conceive a state of society, in which this pretended *natural* right could exist. It was, *probably*, the laws of the twelve tables. Mr. J. is *positive* (p. 66.) they contained no such provision; he forgets that we have only a few fragments of those celebrated laws; but he is quite as well acquainted with the laws he has not read, as he appears to be with those which he has.

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3. The person using force to recover his possession, forfeits his title, if any he had, to the property.

Si invasor sit dominus, amittat dominium illius rei, et applicetur expulso; si verò non sit dominus, tenetur ei reddere possessionem ablatam, et insuper æstimationem ejusdem rei.

Gom. in leg. Tauri, p. 513.

If the deforcior be the owner, he shall lose the ownership of the property, and it shall be vested in the person expelled; if he be not the owner, he shall be held to restore the possession he has taken, and moreover, the estimated value of the property.

Si algun entrare ó tomare por fuerza alguna cosa que otro tenga en su poder y en paz, si el forzador algun derecho ai havia, pierdalo; y si derecho ai no havia, entreguelo con otro tanto de lo suyo, y con la valia, à aquel à quien la fuerzò: mas si alguno entiende que ha derecho en alguna cosa, que otro tiene, en juro y en paz demandelo.

Rec. de Castilla L: 4 tit 13. l. 1.

If any one shall *enter* or take by force, any thing which another possesses in peace, if the despoiler had any right, let him lose it; if he had no right, let him deliver it, with other like property of his own, or the value thereof, to him whom he hath despoiled; but if any one supposeth he hath a right to what is possessed by law, and in peace, let him demand it by law.

4. By the Spanish laws the government, and all its officers, are as much restrained from using force as an individual.

Defendemos que ningun alcalde, ni juez, ni persona privada no sean osados de despojar de su posesion à persona alguna sin primeramente ser llamado, y oido y vencido por derecho, y si pareciere carta nuestra por donde mandaremos dar la posesion que uno tenga à otro, y tal carta fuera sin audiencia, que sea *obedescida y no cumplida; y si por las tales cartas o alvalaes algunos fueron despojados de sus bienes por un alcalde, que los otros alcaldes de

We forbid any alcalde or judge, or any other person, to be so daring as to despoil any one of his possession, without his being first CITED, and HEARD, and ADJUDGED according to law; and should any royal mandate from us be produced, by which we may command, that the possession held by one should be delivered to another, and such mandate should be granted WITHOUT HEARING THE PARTIES, let it be disobeyed* and not executed; and if by any such

*The original is as I have transcribed it, *obedescida*, which signifies *obeyed*. This would be so directly at variance with the context, as to make complete nonsense. I have therefore supposed there must be an error of the press, and that it ought to be *desobedescida*, "*disobeyed*," as I have translated it. The reader, however, may judge for himself. I point out what I suppose to be the mistake.

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la ciudad, o de donde acaesciere, restituyan à la parte despojada hasta tercero dia, y pasado el tercero dia, que lo restituyan los oficiales del consejo. Recop. de Castilla l. 4. tit. 13. l. 2.

mandate any person should be deprived of his estate, by an alcalde, let the other alcaldes of the city where it shall happen, restore the party ousted, until the third day; after the third day, let him be restored by the officers of the council.

The same provision is repeated and enforced by the seventh law of the same title and book, and by the first, second, third and fourth laws of the eighteenth title; the first of which directs, that any patents or orders, which may be given contrary to *right* or to *law*, or to the custom of courts, shall not be complied with: although they contain a clause directing them to be obeyed, notwithstanding any custom, law or ordinance.

" Porque acaesce que por importunidad de algunos o en otra manera nos otargarémos y librarémos algunas cartas o alvalaes contr a derecho o contra ley o fuero usado: porende mandamos que las tales cartas o alvalaes no valan ni sean cumplidas aunque contengan que se cumplan no embargante qualquier fuero o ley o ordenamento o otras qualquier clausulas derogatorias."—" Whereas it may happen, that through importunity or otherwise, we might grant letters or mandates contrary to law, or to some established custom; we, therefore, order that all such letters or mandates BE NOT EXECUTED, although they should contain a clause of *nonobstante statuto vel lege*, or any other derogatory clause."

The 31st law, tit. 18, of the third Partidas, asserts the same principle; declares all mandates of the king, given against natural right, to be *void;* and gives as an instance, the taking the property of any one, unless he had forfeited it by conviction for some crime. If it were necessary to make the research, I believe similar provisions may be found in the constitutions of every power in modern Europe. In France, we have seen, in a former part of this discussion, that the king, when he thought proper to claim alluvions as the property of the nation, did not deem himself authorised at once to seize on them, and oust the possessors. He ordered surveys to be taken, researches to be made, and gave the claimants an opportunity of making that successful appeal to the laws, which secured their property against the pretensions of the crown. It is not true then, as Mr. Jefferson believes, that no nation has ever yet restrained itself in the exercise of this

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natural right. They have not all had that horror of the "*cavils of litigation,*" that seems to have possessed the president of the United States; and while the most absolute sovereigns in Europe are seen to submit their claims to the decision of the laws, the first magistrate of a free republic, has the honor of inventing the practice of taking by force, and of applying to this proceeding the pithy expression, of seizing, at "*short hand,*"* all that he chuses to call the property of the public.

But the example of England is cited; and if it were against me, what would be the consequence? Does Mr. J. think he can assume the powers, as easily as he does the style of the king? But it is not against me; the laws of England are as far from making the king both judge and party, as those of France and Spain.

It is acknowledged, that "there are cases of *particular circumstance*, when the sovereign must institute a previous inquest;" "but in *general cases*, as the present, he *enters at once* on what belongs to the nation." "This (it is confidently asserted) IS THE LAW OF ENGLAND." I undertake, on the contrary, to shew, most explicitly, that this is not the law of England—that it is the very reverse; that, in *general cases*, the king cannot enter without an office found, or a judgment on an information for intrusion; and that it is only in cases of *particular circumstance*, as Mr. Jefferson calls them, (when there is evidence tantamount to the inquest) that these proceedings are dispensed with.

I should be surprised to hear this position from any other lawyer in the United States; but the review of this work has taught me a difficult lesson; I now wonder at nothing I find there. Let me go on then calmly, with the dull work of refutation. The constitution of England, is the most unfortunate example to which he could have referred. Though, in theory, the king is supposed incapable of committing a private wrong, in practice he is not permitted to do it. A remedy is provided for every aggression of the subjects' right. The king cannot enter, without an inquest found, or a judgment on an information; or some other matter of *record*, by which a *primâ facie* title is apparent; and even after this, the claimant may either traverse the

* Mr. J. not being able to find in the phraseology of our own law, any expression sufficiently descriptive of his outrageous proceeding, has borrowed, it seems, this technical term from the Scotch lawyers, who apply it sometimes, to distress for rent, impounding of cattle *damage feasant*, and other remedies of a similar kind, authorized, but regulated by law, so as not to produce oppression or injustice in practice. "Poinding *at short hand* for house-mail." Kaims' Law Tracts, 159.

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inquest, or have a *monstrans de droit*, on which he may controvert the title of the king; and should he shew a better in himself, he has a judgment of the court, which instantly and by the very act, puts the king out of possession. This is so much the A B C of the profession, that it would be a vain parade of research, were I to cite all the authorities that could be produced. A page or two of Blackstone will settle the question.—

3d Blacks. 257. 259.—"The methods of redressing such injuries as the crown may receive from the subject are, first, such common law actions, as are consistent with the royal prerogative," &c. &c.

Second, the inquisition or inquest of office, which is an inquiry made by the king's officers, his sheriff, coroner, or escheator, *virtute officii;* or by writ to them sent for that purpose; or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels," &c.—"These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which, he, in general, can neither take nor part from any thing. For it is a part of the LIBERTIES OF ENGLAND, that the king may not *enter upon, or seize any man's possessions upon bare surmises*, WITHOUT THE INTERVENTION OF A JURY."

There are some exceptions to this rule; one is created by statute in the tyrannical reign of Henry the Eighth, which enacts, that the estate of a person attainted of high treason, shall be vested in the crown, without inquisition.

Another is derived from the operation of law, which gives the crown the same, but no greater rights on this subject than are enjoyed by a subject, if the possession in law is cast upon him; as where he takes, by descent, in remainder or reverter. Stamf. 54. 4 Co. 58. Sav. 7. 9 Co. 95. 6.—For in all cases where a common person is put to his action, there, even after an office found in his favour, the king is put to his *scire facias;* for an office entitles the king to an action only, and not to an entry; but where a common person may enter or seize, there an office, without a *scire facias* shall suffice for the king.—9 Co. 266. Stamf. 55. *a.*

The last case in which the finding of the inquest is dispensed with, is where the king's title already appears by record; in which case it is generally unnecessary.—Stamf. 56.

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But even in the case of an inquest found, it is not conclusive. The government of England has thought it not derogatory to its dignity, in favour of the subject's right of property, further "to bind up its own hands in the manacles and cavils of litigation;" (for it is in these terms a republican president expresses himself to designate an appeal to the laws.) The subject contending with his sovereign, may still sturdily refuse to yield. The law has provided him with more than one resource. He may, in most cases, traverse the fact found by the inquest; and has, in all cases, either his *monstrans de droit*, or his *petition of right*. The first, when he does not deny the facts found; the last, where he relies on new matter in support of his title.

Third. The third mode pointed out by the law of England, for the redress of injuries to the crown, by taking possession of public lands, is that of information "for intrusion, for any trespass committed on the lands of the crown; as by *entering thereon without title*, holding over after a lease is determined, taking the profits, cutting down timber, or the like." 3 Bl. Com. 261.—In all these cases, the party claiming a title, has a full and fair opportunity of shewing it, of examining that of the crown, and submitting both to the decision of a jury. Is it not extraordinary then, that one so well versed in the laws of England as Mr. Jefferson, should publish so deliberate, so malicious a libel on its jurisprudence?—that he should cite the English government as one which disdained the forms of law, and seized, at *short hand*, whatever it chose to call its own? as one under which the subject was liable to be dispossessed, whenever a tyrannical or necessitous king should claim his property as part of the domain? and that he should assimilate the powers of the crown, to those which he has illegally exercised? The boldness of the attempt excites astonishment; but it was necessary to attempt it. The constitution of the country, in which this daring violation of private right was committed,* assured to the inhabitants, "the benefit of the trial by jury," "and of judicial proceedings according to the course of the common law;" and solemnly declared, that "no man should be deprived of his liberty or property, but by the judgment of his peers, or the law of the land." Similar provisions are found in the great charters, which secure the English subject against the encroachments of the crown. It was necessary, therefore, to persuade the

* Ordinance of 1788.

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American citizen, that these sacred provisions were nugatory in England, before he could calmly see them violated in America.

The contrast, too, between a monarch whom he had designated as a tyrant, bound up by the *manacles of litigation*—unable to *seize his own at short hand*—forced to respect the possessions of his subjects—affording them every means of asserting their rights, and that of the magistrate of a free people—playing the TARTUFFE of liberty—adoring it in profession, but in practice violating its most sacred principles—seizing on the property of a citizen without inquest, or the intervention of a jury—denying him every species of trial, and insulting him with impunity, when he dared to appeal to the public—this contrast was too striking to be endured; and the only way of removing it was, to bring our ideas of the British government, on the level to which his practice had degraded our own.

It is not true, then, that either in England or the more energetic governments which lately existed in the rest of Europe, the crown was permitted to seize property which belonged to it, without the intervention of those forms prescribed by law to protect private possessions from violence. The Spanish law, which is cited as that which persuaded the president that this power was vested in the former government of Louisiana, certainly is not calculated to give this idea. It directs that if any building injurious to navigation be made in rivers, or on their banks, they must be destroyed. This, clearly, is no proof that the government had a right even to put down the nuisance without a trial, much less to seize property that they claimed as their own. But the example of the Spanish governor and *cabildo*, it is said, was a sufficient excuse. This is a curious justification. One of the first Spanish governors, soon after his arrival, led out eight or ten of the principal inhabitants of the country, and shot them with as little ceremony as Mr. Jefferson seized upon my property; but he, surely, is not to learn that the *cabildo* was the *city council*, although the governor presided in it; and if they, legally or illegally, issued orders to destroy buildings which had been erected on Gravier's land, under an allegation that they were nuisances, does this give the same right to the president of the United States? The city council of New Orleans can make by-laws and orders for regulating the streets of the city, the same power was exercised by the *cabildo;* does this give a right to the president of the United States to participate in these

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local regulations? But again I repeat, the Spanish government never took possession of the batture at *short hand*, as of property belonging to itself; Mr. Jefferson, acting in the name of the United States, did. There was, therefore, no example to justify him, and I have, I trust, shewn that if there had, it would have been an unlawful one.

If, then, neither the limited monarchy of England, nor the more absolute ones of France and Spain permitted the sovereign to be his own judge; if the subjects of those powers held their possessions under the guarantee of the laws, and not at the will of the prince, can this power be lodged in the first magistrate of a free people? can that people hold their property by so precarious a tenure? If so, by whatever name the government may be called, it is not *free*. It is of the essence of such a government, to have the three great departments distinct; so monstrous a confusion of the legislative with the executive and judicial powers, must forever forfeit all title to the honourable appellation of a *free* republic. Is the constitution of our country liable to this reproach? Or are those who have administered it chargeable with that of having violated its principles? These are serious questions, and naturally come to be considered in examining what Mr. Jefferson calls his "*third and conclusive remedy.*" This is the law of congress entitled "*An act to prevent settlements being* "*made on lands ceded to the United States, until authorised by* "*law.*"* Whatever other remedies Mr. J. had, he must justify himself under this, for it is the only one he has pursued; he took away my property under this act, and if I can shew: 1st. That my case does not come within it; 2d. That its directions were not pursued; or 3dly, that it is an unconstitutional act, I take away from the president every ground of defence.

I. *This is not a case coming within either the letter or the spirit of the act.* The slightest recurrence to its provisions, must shew that its intent was only to enable the president to guard against the intrusion of a class of men known in the United States by the appellation of *squatters;* that its provisions contemplate uncultivated land, where, from the remoteness of the situation, a sufficient number of settlers might be assembled to resist the ordinary process of law; but that it could not have entered into the mind of a single man who concurred in passing

* 8 Laws U. S. p. 317.

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this act, that it was to give the president the means of depriving an individual of a possession, which perhaps might be the only evidence of his title, in a populous city where the claims of the public could easily be ascertained by law, and if well founded could as easily be enforced. Examine the whole of the act with this view, and it will be found that its provisions and expressions strongly impress these general ideas.—*Settlements* and *taking possession* are forbidden, as are *surveys* and *designating boundaries* "*by marking trees*," or otherwise. The second section allows the actual settler to obtain permission to continue on the "tract or tracts of land," he may occupy, "not exceeding three hundred acres"—and it is from the "*lands aforesaid*" that is, from such *tract* or *tracts*, that the president is authorised to remove the settler.

All these expressions clearly indicate the species of property, the description of lands, which the legislature intended to affect by this law—and shew that its spirit is violated by applying it to city lots, of which the possession, after a long course of expensive litigation, had been assured to an individual by the decree of a competent court.

The property in question comes as little within the letter, as it does within the spirit of the law.

The first section, which is said (p. 69) to be "*my part of the act*", enacts "That if any person or persons shall, *after the* "*passing of this act*, take possession of, or make a settlement "on any *lands ceded or secured to the United States*, by any "treaty made with a foreign nation, or by a cession from any "state to the United States, which lands shall not have been "previously sold, ceded, or leased by the United States, or the "claim to which lands, by such person or persons, shall not "have been previously recognised and confirmed by the United "States: or if any person or persons shall cause such lands to "be thus occupied, taken possession of, or settled; or shall sur-"vey or attempt to survey, or cause to be surveyed, any such "lands; or designate any boundaries thereon, by marking trees, "or otherwise, until thereto duly authorised by law; such of-"fender or offenders, shall forfeit all his or their right, title, and "claim, if any he hath, or they have, of whatsoever nature or "kind the same shall or may be, to the lands aforesaid, which "he or they shall have taken possession of, or settled or caused "to be occupied, taken possession of, or settled, or which he or

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"they shall have surveyed or *attempt* to survey, or *cause** to be "surveyed, or the boundaries thereof he or they shall have de- "signated, or *cause*† to be designated, by marking trees or other- "wise. And it shall moreover be lawful for the president of the "United States, to direct the marshal, or officer acting as mar- "shal, in the *manner hereinafter directed*, and also to take such "other measures, and to employ such military force as he may "judge necessary and proper to remove from *lands ceded* or "secured to the United States, by treaty, or cession as aforesaid, "any person or persons who shall hereafter take possession of "the same, or make, or attempt to make a settlement thereon, "until thereunto authorised by law. And every right, title, or "claim, forfeited under this act, shall be taken and deemed to "be vested in the United States, without any other or further "proceedings: *Provided*, that nothing herein contained shall be "construed to affect the right, title, or claim, of any person to "lands in the territories of Orleans and Louisiana, before the "board of commissioners established by the act, entitled "An "act for ascertaining and adjusting the titles and claims to land "within the territory of Orleans and the district of Louisiana," "shall have made their reports, and the decision of congress "been had thereon."

To bring the premises within the words of this section, they must be:

First, *lands ceded or secured to the United States.*

Secondly, *possession must be taken after the passage of the act* (3d March 1807). But:

1st, These lands were not *ceded or secured to the United States.* The treaty of the 30th of April, 1803, which cedes Louisiana to the United States, gives them the sovereignty of the country, and all public lots, buildings, squares and *vacant lands*,‡

* It is so printed in the statute book, *attempt—cause;* from the context, however, it seems it should be *attempted—caused.*

† Same remark as in the preceding note.

‡ See the case of *The Commonwealth* v. *M'Kissick et al.* 4 Dallas 292, where these terms "*vacant land*" are adjudged not to include property in a city.

Lands granted by the British government before the revolution and forfeited to Virginia, are not "vacant, waste, or unappropriated lands," and could not be located as such by a person having a right to locate lands under the general land law of that state. *Grace* v. *Trustees of the University*, Court of Appeals, Kentucky.

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but by the third article expressly provides, that the inhabitants shall be protected in their property.—If this land, then, was an inherent part of that which had, long prior to the treaty, been granted to those under whom Gravier claimed, they were not included in the cession to the United States, and were excepted out of it by the third article. That it was, by the very law of its existence as alluvial property, an inherent part of the original grant, I think has been sufficiently shewn. It was then not "*ceded or secured to the United States*," but on the contrary reserved for, and secured to the proprietors of the original grant.

And 2dly, These were not lands of which the *possession was taken after the passage of the act.*

It has been shewn from the nature of the property, that a constructive possession was all that could have been had in it, until its increase rendered it an object for improvement. That from that period, evident and notorious acts of ownership were exercised; public sales of parts thereof made fourteen years before the passage of the law, and an actual occupation, a *pedis possessio*, taken of other parts more than three years before. These acts, also, were made known to Mr. J. not only by publications but by record. The judgment of the superior court, whatever may be its effect as to the title of the United States, ought certainly to have been, at least, presumptive evidence to the president, of the *facts* asserted in it; he ought in common decency, in common justice to the characters of the judges, to have supposed that they would not have asserted on their oaths of office, that as fact, which was not proven before them,—and to have had at least respect enough for men of his own choice, to have supposed them capable of knowing when a fact was proved or not.

That judgment rendered by men of abilities and integrity, rendered after two years most laborious hearing of the cause, on the spot where the facts were controverted, against the popular side of the question, in defiance of clamour and riot; that judgment *quieted* the plaintiff in *his enjoyment* of the property, but did not give him a *new possession*. It referred to that which he had always enjoyed, and made perpetual an injunction against disturbing him, which had been granted at the beginning of the suit, two years before the passage of the law.

But because I took possession by virtue of my purchase from Gravier, after the passage of the law, my possession is not to

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be protected. He could not have dispossessed Gravier, because *his* possession was anterior, but he may dispossess me who purchased that possession, because mine was posterior to it. What monstrous doctrine! Am I eternally obliged to be repeating the *first* principles of law, to one of the *first* lawyers in the United States?

That the vendee has all the rights of the vendor; that the possession of the one, is continued to the other, so as to effect even a title by prescription, is now for the first time called in doubt. It is true in all laws and particularly well settled in the civil—"Quotiens autem dominium transfertur; ad eum, qui accipit, tale transfertur, quale fuit apud eum qui tradit." Dig. de adq. rer. Dom. l. 20. s. 1. The only question is, what possession had the person from whom I purchased? I say a complete one, a possession in fact, a possession in law, a possession shewn by record, and a just possession.

"*Justè* possidet qui auctore prætore possidet," Dig. de adquir. vel amitt. possess. l. 11. "He is a just possessor who is in by the authority of the judge."—Gravier was in by the authority of the judge, by virtue of the injunction issued in April 1806, more than a year before the passage of the law.

Gravier's possession was *my* possession, it was a *just* one and was long *anterior* to the passage of the law.

If this were not true, every purchaser of property in this country, since the 3d of March 1807, would be liable to be dispossessed by the words of this act, although the seller had been in possession from time immemorial. It is clear then, that the act contemplated a *new*, not a *continued* possession, although the possessor might be changed. Mr. Jefferson, (p. 69), affects to think that my counsel contend for what he calls a *remitter* of possession under the judgment, and says he will shew the judgment to be void, as being given by incompetent judges. In the first place neither my counsel nor myself, have contended for any thing like a *remitter*. We had said what I have just repeated, that my possession is a continuance of Gravier's, that the possession is entire, though the person of the possessor is changed, and we rely on the judgment only as evidence of the *fact* of possession, not as giving us any right against those who were no parties to it. Sensible of the weakness of his argument on

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this point, Mr. Jefferson is reduced to a necessity which would deserve our pity, if the expedient he adopts to relieve it, did not excite feelings of a different description.

"If (says he) the judgment of the Court had been a remitter," that is, if my possession should be deemed a continuation of Gravier's, and of course not subsequent to the law, "then I should have observed that the order had been executed on a person not comprehended in it, for it was expressly restrained to possessions taken after the 3d of March, 1807. In that case the marshal must justify himself not under the order, but in virtue of his personal right to remove a nuisance." What!—The whole of this transaction, then, is a trap for the poor marshal: you have worded your order in such equivocal terms, that though he should do, what you acknowledge it was your intention he should do—your order should be no justification for him; acting under the mandate of the President, that mandate is not to be his warrant, but he is to justify himself for taking possession of the Batture, as of "*Lands ceded to the United States*," under *his* right to remove a nuisance which he never did remove, and which both you and he well knew was no nuisance.

In the whole of this transaction, then, we find a consciousness of wrong, a fear, from the very commencement, of legal investigation, and a studied contrivance to shield himself from the consequence of his illegal acts, at the expence of those by whose ministry they were carried into execution; and this suggestion by which Mr. J. endeavours to escape from the responsibility of the act, and throw it on an honest man who would have lost his office if he had refused to obey; this generous contrivance by which the marshal is left to escape as he can, behind the poor paper defence that is prepared for him,—all this is of a piece with the plea made in Virginia, that I ought not to sustain my action against the principal aggressor, because I had not brought in his instrument to share the penalty and ease him of its load.—"In that case the *marshal* must justify himself *not under the order*, but his *personal right* to remove a nuisance." Not so, sir; the principal aggressor is not so easily to escape; it is not the marshal who is to justify himself, but the President who directed him; the order is not to be withdrawn, in order to make room for the abatement of the nuisance; the mandate and its maker, must and shall stand before the public, at least, if I

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cannot bring them before a Court, and this last poor effort of evasion and chicane shall be of no avail.

If Mr. Livingston's possession was anterior to the passage of the act, then the warrant ought not to have been executed on him; the marshal then has exceeded his authority and cannot use the mandate as his justification, because he was ordered to dispossess *those only who had taken possession after the 3d of March*, 1807. This is Mr. Jefferson's reasoning, but he does not tell us, that when he issued the warrant, he was as perfectly acquainted as he now is, with the date of my possession, and the circumstances under which it was taken. What then was his intention, that it should be executed *on me* or not? If he did not intend that it should be so executed, why was it issued? If he did, with what decency can he now attempt to throw the responsibility on his officer for doing that which he intended he should do.—The quibble therefore drawn from the words of the order will not serve him, for he has made the marshal's act his own, not only by previous intent but subsequent ratification. He has reported it to Congress, he has acknowledged and vainly attempted to justify it to the world, as his own, and ratification renders the principal liable as well for the *torts* as the contract of the agent.

"Dejicit et qui mandat." Dig. 50. 17. 152. He expels another by whose command it is done.

"Sed et si quod alius dejecit, ratum habuero, sunt qui putent (secundum Sabinum et Cassium, qui ratihabitionem mandato comparant) me videri dejecisse, interdictoque isto teneri: et hoc verum est, rectiùs enim dicitur, in maleficio ratihabitionem mandato comparari." D. 43. 16. 1. s. 14.

"But if I ratify the act of expulsion done by another, there are those who think (with Sabinus and Cassius, who place a ratification and an authority on the same footing), that I shall be deemed to have made the expulsion myself, and be bound by this interdict (*undè vi*); and this is true: for it may properly be said that in torts a ratification is equal to a command."

Whatever, then, were the terms of the mandate, it was intended to operate on my possession, (the date of which was known when it issued). It was executed according to the intent, and he who issued it, ratified the execution. Therefore if I have shewn my possession to be prior to the law, I shew an illegal act, and prove Mr. Jefferson himself, not the marshal, alone guilty

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of it, and on this point, as well as the former, I may flatter myself with having proved, that neither my property nor my possession of it, came within the purview of the act of Congress. But if they had been embraced by it, the act of dispossession was not the less illegal, because:

II. *The directions of the act were not pursued.*

Soon after the United States had taken possession of Louisiana under the treaty, an act was passed, of which the object was to discover what tracts of land had been legally granted by the former sovereigns, and how much was still vacant. It directed that persons claiming lands, should exhibit their titles to boards of commissioners appointed for that purpose, by the first day of March, 1806, which, by a subsequent law, was extended to the first day of January, 1808.—This exhibition of title is made *obligatory* on the claimants under incomplete titles, *optional* with those proprietors whose grants were formal and complete. Act of the 2d of March, 1805. Sect. 4.

The claimants under complete grants having their title secured by the treaty, were, as we see, under no necessity of filing their claims. Those only who wanted a further confirmation from the new government, were obliged to do it.—That under which this land was held, being a *complete grant*, those who claimed under it, did not deem it necessary to incur the expence of laying their title before the commissioners, and this is a full answer to Mr. Jefferson's declamation, about my declining or passing by "the preparatory tribunal of the commissioners."* It was left at my option, whether I would submit my title to their inspection, or not, and we shall presently see that the time given me by law to make this election was not allowed.

There is another law of the United States, supplementary to the former respecting lands, which is approved on the same day with that under which the warrant was issued, but being two chapters before it in the statute book, was probably passed by the two houses some time before. This law extends still further the time for the exhibition of claims, to the 1st of July, 1808, declaring that "persons delivering such notices and evidences shall be entitled to the *same benefit*, as if the same had been delivered within the time limited by the former acts," and which gives (by the 4th section) to the commissioners the right of *finally* deciding all claims for a quantity not exceeding one league square of land, in favor of any one or his legal represen-

* Jeff. pp. 69. 70.

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tative, who was an inhabitant of the province on the 20th of December, 1803.

The first section of the law under which the mandate issued, we have seen, contains a proviso that "nothing therein contained, shall be *construed* to *affect the right, title or claim* of any person to lands in this territory—until the commissioners shall have made their reports, and Congress shall have decided thereon." —Now as this proviso is contained in "*my part of the act*," I must be entitled to its benefit; and as the commissioners did not make their reports until the end of 1812, and Congress have not yet decided on them, I have a right to protest against any *construction* of the section, which *affects* my "right, title or claim," and most assuredly that construction affects them all, which supposes it to vest in the president the power of dispossessing me by force, without a hearing. Does it not *affect* my *right* to lands, to give another the legal power to deprive me of their enjoyment? The exercise of this power is a temporary destruction of my rights. Let us distinguish; the casual loss of possession does not, indeed, absolutely destroy my right to the land, but giving another the legal power to dispossess me, does *affect* it, because it creates a *right* in that other to expel me, which is inconsistent with my right to enjoy. There cannot be two inconsistent rights to the same thing. The right to enjoy is inherent to the right of property; whatever interferes with, a fortiori, whatever destroys it, must *affect* that right. Therefore a right given to another to expel me from my land, *affects* my right to the land, and as, by the very words of the proviso, the power to *affect my right* is limited to the happening of events which had not then, and have not yet taken place, it follows irresistibly, that having done an act which does *affect* my right, he has done that which was not warranted by the law, in other words he has not pursued its provisions.

Taking his usual liberty with the text of every law that stands in his way, Mr. Jefferson quotes the proviso thus, (page 69): "Providing however that this *removal* shall not affect his *claim*, until the commissioners shall have made their reports, and Congress decided thereon."—And he takes care to connect it with the enacting clause, by placing it between the *same inverted commas*, as being a continuation of *the same text*.—Never was there a more flagrant perversion. If the law had really declared, as this false quotation makes it declare, that the *removal*

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should not affect the claim, &c., then it might have been understood to authorize the removal; but the proviso says nothing of the effect the *removal* is to have on the claim; its words are: "*Provided that nothing* HEREIN CONTAINED, *shall be construed to affect*," &c. What was *therein contained?* Not the *removal*,—that is not contained in the law,—*but* the *power to remove*, and the law, then, substituting this synonymous phrase, would read thus: *Provided that no power herein given to the president, shall be construed to affect the right, claim, or title &c. until the commissioners, &c.* If the intent of the proviso had been such as Mr. Jefferson supposes, the language he ascribes to it, would have been in truth adopted; if it had intended that the president might remove from the possession, and that the party might afterwards discuss his eventual right to recover it, before the commissioners, the expression *removal*, or some other equivalent one would have been employed; but even then we should be at a loss to account for the subsequent limitation, "*until* the commissioners shall have reported." The removal shall not affect the claim *until* the report is made and decided on. Shall it then? certainly not; according to Mr. J.'s construction, the removal is to keep every thing in *statu quo;* it cannot, according to his sense then, *affect the right* any more after, than it did before it took place, and the limitation therefore, as he reads the phrase, is nonsense. But as I construe it every thing is consistent; the president shall have the right of removal, but he shall not exercise it as to the lands in Orleans or Louisiana, *until* the commissioners shall have reported, and Congress shall have confirmed their report. Why this proviso in favor of these territories? Because commissioners were then occupied in determining what were the *lands ceded to the United States*, to what lands they had conferred the title; in short, in ascertaining by their reports the facts on which alone the President was empowered to act. My construction allows the President to act in something like a legal form; by adopting it and restraining his right of removal to the time when the reports of the commissioners shall have been confirmed, he will at least have some evidence of the facts and of the dates: that evidence will have been collected in something like a legal form, the party will have had an opportunity of producing his witnesses, and knowing those who have appeared against him, and a substitute of some sort, will have been provided for the inquest of office. But by

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the interpretation given to the proviso by Mr. Jefferson, the President must proceed without any means of ascertaining the facts which alone render his measures legal, should he wish to proceed correctly; and what is worse, he *may* proceed, should he be guided by unworthy motives, he *may* proceed directly contrary to the intention of the law. As on this construction he is sole judge, both of the evidence used and of the means of obtaining it, he may listen only to his own suspicions or the secret denunciations of others, he may consult the private interest of his favorites or his own popularity, and masking the whole with the appearance of zeal for the public interest, he may chuse the innocent victims of the law among his enemies,* and suffer guilty aggressors, who have the merit of supporting him, to escape; he may do all this with impunity, because whenever called on to account for his conduct either before the public or his constitutional judges, he may say, as Mr. J. has said, if I erred, it was an error of judgment, the law made me the judge of the evidence and I thought it sufficient.—Should the plain language of the law be followed, no such excuse could be allowed, for the report of the commissioners would have ascertained the facts, and have left the President no occasion for the application of his judgment to the evidence.—Which of these constructions, then, is most probably the true one,—that which leaves every thing to the discretion of one man, which makes him judge of law, of fact, and executor of his own decisions, which permits him to take evidence in secret, and even allows him to act without it, which destroys all responsibility, and gives a ready excuse for every act of violence,—or that which confines the executive to executive duties, which ascertains facts by the open examination of witnesses, prevents every act of expulsion until the fact is ascertained to warrant it,—and affords no excuse for a wanton act of oppression. Surely in a government of departments, there can be no hesitation in deciding on this alternative.

Thus we find, that in the first section, which he emphatically terms "my part of the act," there are provisions that ought to

* —— Nunquam, si quid mihi credis, amavi
Hunc hominem.—Sed quo cecidit sub crimine? quisnam
Delator? quibus indiciis? quo teste probavit?
NIL HORUM: verbosa et grandis *epistola* venit
A Capreis.—Benè habet, nil plus interrogo. Juv. Sat. x.

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have protected my property from this violence. But this is not the only proviso overlooked on this important occasion. By the first section, we have seen that the president was authorised to direct the marshal, *in the manner therein after directed*, to remove from lands ceded, &c. In order to determine whether the law has been pursued, we must inquire what is the manner of directing the marshal, that is *therein after directed*.—The second section contains no provision on this subject; it relates to persons residing on lands belonging to the United States; and directs a mode, by which, provided the party renounces all claim, he may obtain permission to remain on the land.—The third section provides for the registry of such permissions.—The fourth and last section, only, contains these directions; and in the first line, we find a provision which has been totally disregarded. "It shall be lawful, (says this section) AFTER *the first day of January next*," for the marshal, under such instructions as may for that purpose be gived by the president of the United States, to remove from the lands aforesaid, any and every person who shall be found thereon, and who shall not have obtained permission to remain thereon as aforesaid.

There is, then, a provision, that three months' previous notice shall be given to those, who were settled on such lands prior to the passage of the act; and imposes a penalty on them for non-compliance with such notice. It then points out clearly, and explicitly, the nature of the evidence required, in these words: "and the certificate of the proper register or recorder, shall be a sufficient evidence, that the tract of land which was occupied by the offender, had not been previously sold, leased or ceded by the United States; that the claim to such tract had not been recognized and confirmed by the United States; and that the person occupying the same, and removed, or to be removed, had not obtained permission to remain thereon, in conformity with the provisions of this act." Then another proviso, that nothing in this section contained, (and note, that this is the only section, which directs the manner of authorising the marshal to remove) shall be construed to apply to any person claiming lands in the territories of Louisiana and Orleans, whose claim shall have been filed, with the proper commissioners, *before the first day of January next*.

Now, what can be said for the open contempt of every provi-

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sion of this fourth section, to which the first refers the president for the manner in which he is to direct the removal?

Its operation is limited to some time after the 1st of January, 1808; yet on the 30th of November preceding, he signs the warrant. It is not to apply to any person in this territory, who shall have filed his claim before the 1st of January, 1808; yet, without waiting to see whether I would file such claim, the mandate is issued a month before that day. Should this last objection be answered by saying, that the event has shewn, that I did not file my claim before the 1st of January,—I reply, this does not excuse the illegality of the warrant; the law does not authorise him to command the marshal to remove such as he believes *will not* file their claims before the period assigned, but only such as *have not done it.* He was therefore, if he intended to observe the law, obliged to wait the expiration of that period. Should he attempt to obviate the first objection, by saying, that the limitation relates to the execution of the order by the marshal, not the giving it by the president, I answer, that this is at war with the spirit, and even the letter of the act; which clearly intended to fix the period at which the commissioners' power ceased, as the one at which that of the president should begin; for this plain reason, that inquiry should precede action; that facts should be stated before a conclusion could be formed; that sentence should go before execution.

And I further reply to both these answers, by remarking that, though the first day of January was designated by both the provisions I have pointed out, yet that period is fixed, only because it was the time limited for the commissioners to receive claims; and that this period was extended to the first day of July following, by an act passed the 3d of March, 1807; which expressly provides, that "persons delivering such notices and evidences, (before the 1st of July, 1808) shall be entitled to the *same benefit*, as if the same had been delivered within the time limited by the former acts," (before the 1st of January, 1808.) Now, I ask, whether exemption from removal was not a *benefit* I would have been entitled to, by delivering my claim before the 1st of January, 1808, by the former act? If so, it is secured to me by the act of 1807, provided I file the claim before the first day of July. Yet, without waiting to know whether I will file it, even before the 1st of January, the warrant is issued in November, by the president, and the marshal executes it in Ja-

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nuary: in defiance of the law which explicitly gave me *until July* to perform the act, on the failure of which alone I could be dispossessed. In this, also, the directions of the act have been disregarded, even if mine were a case coming within it.

If, however, this act comprehends such a case as mine, and authorises such proceedings as have been had against me, it will cost no great trouble to shew,

III. *That it is unconstitutional.*

The government of the United States, is one of departments. With some exceptions, the three great branches are kept perfectly distinct. Those exceptions being clearly pointed out, prove the rule. The president participates in the duties of the legislative branch by his qualified *veto;* the senate, with those of the executive, in confirming appointments; and both the senate and house of representatives, with those of the judiciary, by their agency in preferring and trying impeachments. No duties, however, mingling with those of the other departments, have been prescribed by the constitution to the judiciary.

An act imposing the duties of one of these branches upon either of the others, is unconstitutional. One arming a single branch with the powers of the others, is tyrannical as well as unconstitutional. Whatever tends to this effect in its consequences, sins against the spirit of the constitution—whatever produces it directly, violates its letter.

To prescribe rules by which a question of property shall be determined, is a legislative act. To decide that question, is a judicial one; and to carry that judgment into effect, belongs to the executive power. In our constitution, congress enact the rules of evidence. One branch of the judiciary ascertains the fact, to which the other applies the law; and the president, by his ministers, executes the sentence. There is harmony as well as justice in this distribution. Whatever inverts it, is unconstitutional and tyrannical. To prescribe what acts are necessary to acquire or to preserve property, is an exertion of *legislative power.* Should it be exercised by the *judiciary*, as the same power that makes may alter, there would, in fact, be no rule; it would vary with every case. Law is nothing but the expression of legislative will. In cases where judges are legislators, we should have no law but the judges' *will;* consequently, no fixed law as a guide for judicial decisions. Such a state would be one of miserable servitude; and admit of no increase, but that which

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would result from adding to the right of making and expounding laws, the power of executing them. There can be no civil liberty in the government where this confusion of power generally prevails; and the constitution of a country is less perfect, in proportion to the number of particular cases in which it is admitted. By our constitution, this intermixture of powers is sanctioned only in the instances already pointed out. Whatever act, therefore, multiplies these cases, is unconstitutional.

Let us test the law now under consideration, or rather Mr. Jefferson's practical construction of it, by these principles. It authorises him to remove persons, who have taken possession of lands belonging to the United States before a particular period. Whether certain lands belong to the United States, whether a certain individual has taken possession of them, and at what period, are *judicial questions*. The removal that takes place after their decision, is undoubtedly an executive act. But by Mr. Jefferson's construction of the law, and his practice under it, both these duties devolved upon himself, and produced an union of judicial and executive powers. But before a decision could be made on the question of property or possession, some rules of evidence must be formed, some law by which the decision is to be made;—what shall be the evidence of property—what of possession—shall it be written or oral, positive or presumptive—how this evidence is to be produced—shall it be taken in the presence of the person interested, or *ex parte* only—shall he have the privilege of producing proof—shall he be heard by counsel? The solution of these, and many other questions of the like nature, are so many laws which must be provided for the judge. If he be allowed to make them, he has then *legislative power*. But this is precisely what Mr. Jefferson has done, and what he thinks the law allows him to do. The law then, by his construction of it, gave him, as president, legislative, executive and judicial powers; and, of course, if there be any truth in the principles I have laid down, must be unconstitutional.

On the last division it may be answered, that, although the act gives no rules of evidence, it does not necessarily follow, that it delegates the power to make them; and that there are laws already in existence on this subject. To this I reply, that those rules relate to the common course of judicial proceeding in courts; and that when powers are given, totally inconsistent

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with that course of proceeding, another set of rules must be provided. And of this opinion Mr. Jefferson seems to have been; for there is not a rule of judicial proceeding, that he has not discarded—not a principle of evidence, that he has not violated—not a maxim of justice, that he has not trodden under foot in the course of this investigation. His evidence was *ex parte*—taken in secret; and what evidence? *quo teste? quibus indiciis?* Deeds? Documents? depositions of witnesses?—Nothing of the kind: *nil horum*, as in the passage from Juvenal before quoted.* What, then?—Again in the language of the Roman satyrist, *verbosa et grandis epistola venit.* He had the *letters* of a man known to be at variance with me, and the argument of a counsellor, whose duty it was to invalidate my title, and who had been professionally employed for that purpose. This, I am well convinced, is all he had; for, whatever shreds of proof he may have patched together since,† I have the strongest presumptive testimony he had nothing better then. With this, and this alone he was satisfied. *Benè habet, nil plus interrogo.*

* P. 244.

† A few months after the transaction, I wrote to Mr. Rodney, to whose advice I was always referred for a justification of the proceeding. I wrote to him, to intreat that he would let me have a copy of his opinion, and give me the evidence on which he had founded it. I conclude one of my letters on this subject to him thus:

"I give you at foot a list of the documents I have seen, trusting, that if there are any others, which you have made the basis of your advice, you will communicate them." At foot was this note: "List of documents furnished to support the title of the United States, which I have seen.—1. Mr. Derbigny's statement and opinion. 2. Examen de la sentence. 3. Pièces probantes. 4. Resolution of the corporation of New Orleans, requesting the governor to take measures to assert the title of the United States 5. A letter from governor Claiborne, stating, among other things, that *he believes* Mr. Derbigny's statement of facts to be correct. 6. Extracts from the Deliberations of the Cabildo." To this letter, in which I not only apply seriously to his recollection, but aid it, as far as lay in my power, by pointing out the papers I had since seen, the attorney-general replies: "My impression is, that the *statement of Mr. Derbigny, with his opinion*, and a *letter from governor Claiborne*, mentioning that Messrs. Gurley and Moreau Lislet concurred in that opinion, were the papers officially furnished me; *I do not recollect, at present, that there was any other!!*"—I ask, whether the attorney-general's *impression*, so shortly after receiving the communication of the *two papers;* his want of recollection of any other, when the rest were specially referred to, is not the strongest evidence, that *no other* proof was offered to him?

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The party, so far from being called on to defend his title, had no notice nor the slightest suspicion of the nature of the proceedings against him. It is therefore evident, that the president thought himself bound by no pre-existent rules, either as to the mode of making the enquiry into the title or the fact of possession, or the nature of the evidence to support them; and that he had a right to adopt such as he thought proper, or in other words, to *legislate* on this branch of the subject. According to the practice under this law, and the exposition of it made to justify that practice, it authorizes a confusion in the exercise of powers, confided, by the constitution, to distinct hands, and of course is *unconstitutional.*

But I do not rely solely on the violation of the great principles of the constitution, apparent in this act: there are particular provisions with which the practice, under it, is equally at war.

By the third article, the "judicial power of the United States is vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

By the first article this power of establishing courts, inferior to the supreme court, is expressly enumerated among those given to *the congress.*

By the second article the "president is empowered to require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject *relating to the duties of their respective offices.*"

If, under the clause last quoted, the president should *assemble* the heads of the executive departments, and, instead of asking each one his opinion in writing on a subject relative to the duties of his *separate* department, should put to *all* a question relative to the duties of *one* department, or a question which related to neither,—there is nothing in this contrary to the letter of the constitution, because the members of such a council are at liberty to give or refuse the opinion demanded of them; and when given, it forms no rule for the president's conduct: but though not contrary to the letter of the constitution, it will, I believe, be found contrary to its spirit, by which the president is supposed to take the responsibility of all his acts, divided with the particular officer whose advice he is empowered to ask on the business of that officer's department, but undivided

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as to all those measures which the constitution and laws have placed under his sole direction.

It is true, as I have said, that the heads of departments are not obliged to assemble in what is called a cabinet council, and, when there, each member may refuse to give any opinion, except on the business of his own department. But the exercise of this right of refusal cannot be expected from men holding their offices at the will of the president. It is, therefore, nugatory in practice, and the request of the president is, in this respect, equivalent to a command, which must be obeyed. The convocation of the heads of departments is in effect the creation of a privy council, which is a body unknown to the constitution.—As, however, (it may be said) the president is under no obligation to adopt the decisions of this council, it is an harmless and may be an useful body. It is no more than the convocation of a few enlightened friends, to aid the first magistrate by their advice, which he may adopt or not. This is true in theory, but in practice there is nothing more unfounded.—There is certainly nothing to reprehend in the practice of taking advice and seeking for information; but it ought to be done in a way not subject to abuse, not to create by usage the post of official advisers.—The extra-constitutional practice of assembling the heads of departments to advise the president has now been so long established, that the *cabinet council* is as familiarly spoken of, and is as well known, as if it were established by the constitution. This practice did not, I believe, originate with Mr. Jefferson; but he is the first president, as far as my information goes, who has endeavoured to interpose its resolutions between himself and the people, and to divide, at least, that responsibility which he incurs for all official acts. Here we see how easily, how imperceptibly radical abuses creep into the best governments, and how jealous the people ought to be of the slightest innovation. It was right in the president to seek information and ask advice, it was natural to have recourse to the heads of departments, it was convenient that they should assemble to interchange their opinions, and, in most cases, that opinion being either agreeable to the president for its conformity with his own, or of sufficient weight to carry conviction, that opinion is followed. In all this there is no danger; but in process of time, this assemblage of friends acquires a name in the government; it is a *cabinet council*, and has weight with

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the people. The president's responsibility is lessened when he acts in conformity with this advice, it is increased if he disregard it; and as he can generally manage to secure a concurrence with his own opinions, those of the council are always ready to divide with him that responsibility which the constitution, in its purity, intended to cast upon him personally and alone; and thus a branch of government is imperceptibly created, totally unknown to the written constitution. Hitherto we have seen, in the progress of enquiry, the heads of departments transformed into a privy council, but occupied only with affairs of state, unconstitutionally, it is true, sharing the duties and the responsibility of the executive, but interfering with no other branch of government. It was reserved for Mr. Jefferson (*if his statement be correct**) to invest them with the powers of a court of justice; and if the first decision of this *Star Chamber*† court be submitted to with the apathy that has hitherto prevailed, we need no prophet to assure us that I shall in due time have other companions in misfortune: all cases of public claim to lands, of intrusion, of nuisance, will find their way to this secret tribunal. It ought to be preferred by the public to every other. Defect of title forms no impediment to recovery; the best title in the possessor is no bar to his expulsion; witnesses are not wanted where evidence is dispensed with, and the expense of jurors and salaries of judges are saved in cases too nice to be trusted to the blunt integrity of the one or to the unsophisticated learning of the other. With all these advantages the *cabinet court* will always be preferred, where vengeance is to be wreaked, or popularity gained; and I entreat the people of America to reflect that from smaller beginnings than this, the most oppressive institutions have corrupted other governments, and may destroy our own. Although I have anticipated some of the

* I hope this reservation will be recollected in all I say on this subject. The characters of the gentlemen composing the cabinet, their known attachment to the constitution, independent of other circumstances to which I have alluded above, (p 145), forbid my giving credit to the broad and unqualified statement which asserts their co-operation.

† I *libel* the star chamber and *degrade* the cabinet court, if that court ever existed, by the comparison. There was nothing so odious in the English tribunal as the inquisitorial proceedings stated by Mr. J. to have taken place at Washington; and the right of condemning unheard, would suffer by a comparison with the limited powers of the English court, which, in the plenitude of its power, called on the defendant for his proof, though they sometimes disregarded it.

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arguments on this head, I am yet bound to make out more fully the allegation that the cabinet council, *according to Mr. Jefferson's account of their proceedings*, assumed judicial powers, that they were unconstitutionally exercised, and tyrannically executed, and that as the whole was done at the president's request, and under his authority, *if his statement be correct*, though others may share they cannot lessen his guilt.

The convocation of the heads of departments "to whom the papers had previously been communicated," is distinctly stated (page 21). The first law officer of the United States attended, and "gave all the lights which it was his office to throw on *the subject*." And what was the subject? The right of the president to dispossess certain individuals at New Orleans of lands which they had acquired by fair purchase, and under the decree of a competent court. This right was to accrue in one of two ways.

1. From the individuals being intruders on public lands.

2. From their having been guilty of raising works injurious to the public safety.

Both these are judicial enquiries, the first of civil, the second of criminal law.—To come to any decision on the first, the point of property must be investigated, and afterwards that of possession; and to determine the second, the fact charged must be proved on the persons accused, and the illegality and injurious nature of the works complained of must be demonstrated.

The task then undertaken by the president and his council, was a judicial one in the strictest sense of the word, and they applied themselves to it with some degree of form. A preliminary question to be decided by a court enquiring into a case is, By what rule are we to decide? what law is to govern the case? and we accordingly find that this was the first object of attention with our new tribunal. "The first question occurring (says Mr. Jefferson) was, what system of law was to be applied to them?" They adopt the laws of France, and then they, or Mr. J. (for it does not clearly from his style appear which) reason through forty pages upon the law and the fact, and having clearly settled both in their own minds, they are convinced of the guilt of the accused, and (p. 64,) we have the important enquiry in the criminal cause: "What was to be done with such an aggressor?" Having with a humanity for which I can never be too grateful, determined that though he richly deserved it, they

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would not *burn him alive*, they proceed to declare what sentence shall be passed on the civil side, or to give Mr. Jefferson's words: "The question before *us* was, what is to be done? What remedy can we apply authorised by the laws and prompt enough to arrest the mischief?" The points of law and of fact determined by this tribunal are then resumed and stated with precision, and we at length come to the decree which is thus rendered, (p. 72): "On duly weighing the information before us, which though not so ample as has since been received, was abundantly sufficient to satisfy us of the facts, and has been confirmed by all subsequent testimony,—we were *all* unanimously of opinion that we were *authorised* and in *duty bound* without delay to arrest the aggressions of *Mr. Livingston* on the public rights, and on the peace and safety of New Orleans, and that orders should be immediately dispatched for that purpose, restrained to intruders since the passage of the act of March 3d."

Here is the sentence, and I am mistaken if a more formal one ever received the sanction of a court.

First we are told that they "duly weighed the information *before them*," and though, to be sure, it was not *so ample as has since been received*, yet it was abundantly sufficient to satisfy them of the facts. Here then is a decision in form of the facts in the case.

But, lest any doubt should be entertained of the jurisdiction of the court, an elegant pleonasm is introduced to mark this feature strongly, and shew that no doubts were entertained, at least by the judges, on this subject. We were *all unanimously* (says the classic Jefferson,) of opinion, "that we were *authorised* and in duty bound to arrest the progress of Mr. Livingston." Here the offender is pointed out, and his double aggression distinctly marked; he is found guilty of offences against the *public rights*, and the *peace and safety of the city of New Orleans*.—This is the conviction; in the sentence, I confess, there is more obscurity than I should have expected from the pen of the enlightened chief of the tribunal. "Orders, it is said, should be immediately dispatched for that purpose," (viz. to arrest the aggressions of which I had been found guilty). What those orders were, in what manner the evil was to be arrested, does not appear by the record; they had confidence in the president, perhaps, and left this to his discretion;—but the obscurity is cleared up by the execution which immediately followed the sentence.

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It consisted of an order from the secretary of state to the marshal to remove all persons from the batture, who had taken possession since the 3d March, 1807. The civil power is to be first employed, and in case that should prove insufficient, the secretary at war, another member of the court, orders the military force to carry it into effect.—The sentence was executed, and the unfortunate offender thus legally, fairly, and constitutionally condemned, was reduced from affluence to poverty, from the prospect of independence, to a life of solicitation and labour.

I must be understood, throughout this part of my argument, to speak hypothetically, on the supposition that Mr. Jefferson's statement, of which I have repeatedly expressed my disbelief, is true in all its parts; that the heads of departments did actually sit in council with the late president on my case, and that after deliberating on the subject, they *unanimously resolved* (*as in duty bound*) that I should be dispossessed of that property, or in other words, that my supposed aggressions should be arrested, in such manner and by such means, as the president in his discretion should think proper. Admitting this to have really been the case, I think I have sufficiently shewn that these proceedings amounted to the institution of a *court*, for the decision of the right to property in a manner unknown to the constitution and subversive of its principles. Should it, however, be objected that the decision was not conclusive, that this court or council, as it may be called, only determined the right of possession, I answer that the right of possession is no less the object of judicial enquiry, than the right of property. Should it be said that the order to remove only affects the possession and not the right to possess, my answer is, that in many cases, such as loss of title deeds, actual possession is the only means of securing the right of possession and even that of property,—and that again, the determination of a question which affects my actual occupancy, is a *judicial decision*.—Can it make the slightest difference in its favour, that this proceeding was a decision between the nation and an individual in favour of the rights of the former? The evil intended to be guarded against by distributing the judicial power into other hands than those of the executive, was not so much the fear that injustice would be done in controversies between individuals, as to secure the citizen from the oppression of the man in power, private rights from encroachments which are always made under the specious pre-

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tence of public good. In republican Rome, when the sovereigns were too numerous to be satisfied with the confiscation of individual estates, whenever a demagogue wanted to rise from obscurity, he proposed a general pillage of the rich, under the form of an agrarian law, or of an abolition of debts;—under the emperors, imaginary plots answered the purposes of transferring the inheritance of the richest senators into the imperial coffers; and in both instances, the *rights of the public*, the sacred *interests of the nation*, was the pretext.—Amidst all this public rapacity, private justice was distributed between individuals with an even hand, and some of the most revered sages in civil jurisprudence flourished under the most detestable tyrants of the Roman empire. The injustice of the Star Chamber could never have become proverbial, but for its decisions in cases between the sovereign and his subjects, and Jefferies himself was not remarkable for any outrage in deciding individual rights. The danger then from the assumption of judicial power, is not the less apparent because it was made in favour of the government. It on the contrary aggravates the offence, and I think I have succeeded in shewing that *if the cabinet council actually took the part which Mr. J. attributes to them* in this affair. they have combined with him in the assumption of judicial powers, and have exercised them not only unconstitutionally, but with cruelty and oppression. Should they be unjustly accused, it is not I who have calumniated them. On the contrary, from the character those gentlemen deservedly enjoy, I cannot avoid believing that there is much misrepresentation as to their agency in the business. Should there be none, they must participate, though they cannot lessen, the responsibility of the late president; the whole proceeding was carried on under his name, and *he*, (whoever advised or consented to the measure) *he*, is individually responsible to his country for the act.

3. The unconstitutionality of the law, under the president's construction of it, may also be shewn by a recurrence to certain fixed and sacred privileges which that construction violates.

The seventh article of the amendments provides, that "No person shall be deprived of life, liberty, or property, without due process of law." The ordinance which formed the constitution of this territory at the time, contains a similar provision, but in words which have become sacred as well as technical,—"No man shall be deprived of his liberty or property but by

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the judgment of his peers, or the law of the land." By both constitutions the trial by jury was established. Now, leaving for a moment out of view the right to a trial by jury, what is this law of the land by which alone a man may be deprived of property? An arbitrary act either of the legislature or the executive, or of both? Certainly not. Those arbitrary acts were the very evil intended to be guarded against. It means a process according to the general course of judicial proceeding; a fair, open, impartial trial, as contra-distinguished from secret, inquisitorial investigations, and open, violent inroads upon property. But will the sophism be repeated, that this secures the citizen in the possession of *his* property, not in that of the public;—that if the public seize their own, they may do it legally, without any previous investigation.—But who is to decide whether it belongs to the individual or the public? The government itself. But what branch of it? The executive in the first instance, says Mr. Jefferson, and the legislature afterwards, to correct his errors. This is the political heresy which I wish to refute; this is the dangerous doctrine to which I wish to call the attention of the country.—Had it been only the false theory of a man no longer in office, it would, with some of his other theories, have been laughed at, and forgotten. But he has practised under it, it has become a precedent, and, *as he says*, was sanctioned by the opinion of those now at the head of our government. If the doctrine be dangerous, if the precedent be ruinous, ought it not to excite attention, and become alarming? In treating this part of my subject, my own injuries, great as they are, escape from my view, they sink before the magnitude of the danger which threatens a people insensible to such acts of arbitrary power, to the ruinous tendency of the principles by which they are attempted to be justified.

Let us fairly state those principles. They run throughout the whole book, but are condensed in p. 68.

The nation has a right to take property into its own hands *by force*, and without any previous trial, when that property is its own.

While the property is retained in the hands of the nation, it is not under the jurisdiction of any court, and consequently cannot be claimed by law, because the United States *cannot be sued.*

These are the principles: let us now see whether the nation has a right to take its own at *short hand*, as Mr. J. most em-

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phatically terms it.—But as this expeditious act of justice cannot be performed by the whole nation, nor by all the branches of its government, to whom is it to be entrusted? The practice, in this case, says to the *executive*. The executive power is vested in one man, called the President. This one man then may seize, at short hand, all property of the public which he finds in the possession of individuals. But how is he to ascertain what belongs to the public, what to the individual who occupies it? The answer again given, as well by the practice as the theory of our author is, that he is to get such evidence as satisfies himself: he is to be the sole judge, he is to form his own law, he is to collect his own evidence, or to act without it; he may listen to his own prejudices and consult his own popularity, or he may become the contemptible instrument of the animosities of others.—Whenever, then, he erroneously thinks, or wickedly affects to think, that land in my possession belongs to the public, the president may order a regiment of dragoons to drive me from it at the point of the sabre;—and, as he may keep as well as take, for the use of the public, according to the second branch of his doctrine, I cannot recover the possession, even with the best title, *because the public cannot be sued!* But I have some redress: the man who commits this illegal act is surely responsible to me in damages. No! I can sue him no where but in the scene of his oppression, where he takes care only to be present by deputy. A quibble, drawn from the common law, saves him from all the consequences of one species of action, and against any other he whines out the old threadbare excuse, it was an *error of judgment!*

Is there, then, no resource?—does Mr. Jefferson's doctrine point to no mode of relief where property has been improperly taken? Yes; if the congress choose to sell the lands you may sue the purchaser, and if they keep them in their own hands, you may petition congress.—"The holders of property are safe against individuals by the law, and against the nation by its *own justice.*" This is a pretty phrase, but what does it mean? That the sufferer has a right to petition congress for relief, who are to constitute themselves into a court of justice for the purpose of hearing the cause. They are to examine witnesses, study documents, hear counsel, weigh authorities, and then decide on every case in which the power of the president, or the legality of his acts, may be called in question. They are to give

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up the great concerns of the nation to judge particular claims, or they must postpone the latter until the business of legislation is completed. Admitting that it is possible in a body consisting of two numerous branches, to perform the duties of a court, and to investigate titles, I ask how is it possible for them to go through with the task, without totally neglecting their first and most important concerns. The examination of my title alone, the depositions of witnesses, the pleadings of counsel, the investigation of records, and the researches into foreign laws, necessary to a full understanding of the case, would have occupied them many months; and when all this should have been performed, and one house should be prepared to render judgment, the same task would be to be gone through in the other; and in the end, among near two hundred judges, how many different opinions are to be expected, how many different ideas of fact, how many different deductions of law! what a variety of projects for the final sentence, each one supported by long speeches from the proposers! what endless argument! what confusion! How is it to be terminated? By a total denial of justice; by a delay, which is as bad; by a compromise of individual rights, to suit political purposes. This is a faint, a very faint and imperfect picture of the consequences of that system, which Mr. Jefferson tells the people of the United States is *their* system of government;*—which he represents as preferable to the examination of questions of right before "*irresponsible judges*," as he contemptuously terms the judiciary.—Unhappily for me, a part of this picture is drawn from nature. I have been forced to take the course which he has pointed out. I sought for redress from the legislature. I found there some friends: my cause had able and zealous defenders. It was considered, as it really is, not only a grievous oppression to an individual, but an alarming stretch of power, which, if unnoticed, would grow into a destructive precedent.—Notwithstanding all this, I was kept from my family and my means of subsistence, soliciting

* The celebrated lines of Otway on the tyranny of the Venetian Senate, have been so hackneyed by frequent quotation, that they have lost much of the effect which they are calculated to produce on the minds of reflecting men. But it is a lamentable truth, that they would not so often have been quoted, if cause had not been so often given for their application; and the present instance too clearly shews, that, even under the best constituted governments, magistrates will be found, who, while they violate the most sacred rights of citizens, "TELL THEM 'TIS THEIR CHARTER."

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relief, for more than two years.—During all this time I could not obtain even a hearing. All I solicited was some mode of trial, some tribunal to which I might apply for redress. One plan after another was formed, debated, and rejected for another which shared the same fate.—Every fair and honourable means of solicitation was resorted to, every thing that I thought could excite the interest which my case merited—flattered with hopes to-day—cast down with despondence on the morrow, I felt, during all that period, the miseries of a life spent in solicitation and dependence.* If, as a suitor for justice, I could have resorted to a court, I should have asserted my right and been certain of a decision. I should not have entreated for that which was my due: but in this body, which, according to Mr. Jefferson, is so admirably constituted for the trial of titles, the most unremitted solicitation is necessary to prevent your case being stifled under the mass of public and private business which occupies the attention of congress.—I did solicit, but it was in vain;—I did entreat, but I was not heard. Congress did not, would not, nay, they could not themselves investigate the merits of my case. A majority were for giving me some trial, but they could never agree on the mode; and finally, in despair, I withdrew my petition.—This was the result of my pursuit of relief from congress; and to this result my inhuman adversary adverts with malignant triumph in the close of his work, where, by an irreverent allusion to the scriptures, he enriches the language with a new word, to express his mockery of my complaints. They may be *Jeremiades* in the Frenchified diction of the member of the national institute—but none of them contains

* Ah! little knowest thou, who hast not try'd,
What hell it is, in suing long to bide,
To lose good days that might be better spent,
To pass long nights in pensive discontent,
To speed to-day, to be put back to-morrow;
To feed on hope, to pine with fear and sorrow;
To fret thy soul with crosses and with care,
To eat thy heart through comfortless despair;
To fawn, to crouch, to wait, to ride, to run,
To spend, to give, to want, to be undone;
Unhappy wight! such hard fate doom'd to try;
That curse God send unto mine enemy.——SPENSER.

I quote this passage from memory, and may not, perhaps, have given in every line the exact words of the admirable author. But I have keenly felt all that he describes;—all, but the sentiment expressed in the last line, in which I sincerely declare I do not participate.

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a word, either untrue or debasing, one phrase beneath the dignity of a free citizen who knew his rights. The public shall judge.—I had solicited, as I have said, during several sessions, and was constantly flattered with the adoption of some plan that would secure me a fair trial. A bill was before the house and would probably, could it be taken up, pass; but congress were about to adjourn, the members were impatient to return to their homes, and I feared that, unless some effort were made, the adjournment would take place before the law for my relief could pass. I wrote the following letter, which Mr. Jefferson has selected as a subject of pleasantry in two different parts of his work. It was a circular, addressed to the members of the legislature, in these words:

"SIR,

"The peculiarity of my situation will justify me in renewing to you individually, the appeal which has repeatedly been made to the honorable body of which you are a member. Without entering into any other circumstances of my case, thus much is without dispute;—that without trial or any judicial process, I have, by military force, been driven from the possession of a real estate, of which I was the *bonâ-fide* purchaser, for a valuable consideration, from a person in possession, and under a title recognized to be good, by the sentence of a competent tribunal, judging in the last resort;—that I am an American citizen, and have never done any thing to forfeit the rights to which that quality entitles me: and that the United States being in possession, I have no remedy at law.

"Whether the law of 1807, authorizes the proceedings against me or not; or whatever were the motives of those proceedings, my case is equally one of PRIMARY PUBLIC CONCERN, and is that of every individual in the community, for no one has any *legal* security which I had not. If the law authorizes such proceedings, it is unconstitutional; if it do not authorize them, the misconstruction ought to be remedied. I might therefore, sir, without presumption, *claim* that interference, as a matter of the highest public duty, which, in my present situation, I am content to *solicit* as a private favor. Deprived of a fortune that would place me in a state of independence, I am, by the act of the government, reduced to poverty, and exposed to the pursuits of creditors whose patience will, I fear, be exhausted by further delay: twice obliged

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"to leave my profession and place of abode, my means are ex-
"hausted, and my business lost. Under these circumstances, sir,
"I am persuaded that you will not suffer the trifling inconve-
"nience of a few hours delay, to balance the utter ruin of a fellow
"citizen, who cannot trace misfortune to any imprudence of his
"own, and who only asks that FAIR TRIAL which the constitution,
"you have sworn to defend, secures indiscriminately to all.

"EDW. LIVINGSTON.

"23d June, 1809."

If there be any man who can join Mr. Jefferson's merriment at the terms of this letter, I do not envy that man's enjoyments, and would much rather be the sufferer under the wrongs there detailed, than the one, however high his office, who could first inflict and then deride them.

I have digressed, and return to the course of my argument. Congress cannot, then, from the nature of their organization, from their necessary attention to more important business, occupy themselves with the investigation of titles; but if they had the power, whence do they derive the right?—certainly not from the words of the constitution,—that, as we have seen, gives the judicial power to a separate body. Not from the practice of other nations, because we have seen, that in all others, even of the most absolute form, means were provided to prevent the nation being both party and judge,—not from any necessity, because, if that were the case, it would exist in other nations as well as ours; but practice seems to be resorted to (p. 68.) and the principle that the nation cannot be sued. That the nation cannot be sued does not prevent relief being granted, when the action is *in rem*.—I cannot sue the United States for a debt they owe me, I cannot attach their duties in the hands of the collector, or serve an execution on the monies in the treasury,* but I may form my action for the recovery of my land, by a process *in rem*. The public, then, like any other claimant, may

* Hence arises the necessity to petition in case of *money* claims, but wise men have thought that the public would not lose by establishing some permanent tribunal to take cognizance of them; in most instances the wages of members while the justice of the demand is discussing, amount to more than the debt: one for the value of a horse I found when I came into Congress in 1795. I left it there in 1801, and I believe it was finally decided ten years afterwards. The discussion of this claim alone must have cost at least 25000 dollars. In a Court of justice the costs would not have been one hundred.

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assert their right, and the judges will determine on it, without any reference to Congress, and so far I misconceived my remedy while I was vainly seeking relief from the legislature. This course of proceeding is not new nor beneath the dignity even of *our* government. It is every day's practice in the courts of admiralty; should a collector or any other officer seize a vessel as belonging to the United States, a libel would be filed by the proprietor, and it most certainly would not be dismissed on a suggestion that it was the property of the United States, their title must be set forth and tried in the same manner as the title of an individual.—Where then is the difference if I direct my action against the land; must not the public as well as any other claimant set forth their right and recover or lose, according to the strength or weakness of their title. If this reasoning be just, Mr. Jefferson's ideas on this head are totally unfounded, and Congress have neither the physical power, from their organization, nor the constitutional right to try titles, and of course there is no check to that assumed by the President of judging what lands belong to the public or not; he acts without appeal, without control and without responsibility, and I, therefore, under our government, am warranted in my conclusion that he acts unconstitutionally.

I have proved, therefore, under this head;

1st. That my case is not one embraced by the purview of the act of March, 1807.

2. That if it were, the directions of the act have not been pursued.

3. That as construed and acted under by Mr. J., the act is unconstitutional.

All these conclusions were so apparent, that in a few hours after the president's mandate had been received at New Orleans I had stated the substance of them in a petition which I presented to the superior court, praying them to enjoin the marshal from executing it. The order to that effect was given, not as Mr. Jefferson (with his usual attention to fact) asserts, by a *single judge*, but by the two who composed the court, and on motion in open court.* This order was served on the marshal,

* I should not notice this little aberration if it were not wilfully made. My petition with the signature of the *two* judges was before the president; it is

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who disregarded it; and his disobedience is justified by Mr. J. by reasoning which involves in it an attack on the regularity of the proceedings and the judgment by which Gravier was quiet-

published p. lxi. of *the case for opinion of counsel*, and I insert it here at length, that the reader may judge for himself.

To the honourable, the Superior Court of the first District of the territory of Orleans.

The petition of Edward Livingston, of the city of New Orleans, counsellor at law,

Humbly sheweth,

That John Gravier by virtue of sundry grants from the crown of France, and divers mesne conveyances under them, in the month of November, in the year of our Lord, 1805, was possessed of and entitled to a certain farm, or parcel of land, part of which had been previously laid out into streets and lots, and was and is known by the name of the Suburb St. Mary: That the said farm had, for sundry years past, increased by an alluvion formed by the river Mississippi, which is the front boundary of the said plantation, and which by the laws of the land, became (in proportion as the same was formed) the property of the said John Gravier, and of the several proprietors of the said plantation under which he held, and was incorporated into the body of the said plantation, and by the laws aforesaid, was so held as part of the same.—But the said John Gravier, and those under whom he claims, have uninterruptedly held the said plantation, of which the said alluvion so formed a part, for upwards of eighty years, until some short time previous to the month of November, 1805, when the mayor, aldermen and inhabitants of the city of New Orleans, having disturbed him in the enjoyment of the said alluvion, he presented his petition to the superior court, to be quieted in his possession, and relieved against the said disturbance, and that such proceedings were thereupon had, that the said Superior Court on the 23d of May, 1807, pronounced the decree, a copy whereof is hereunto annexed, in pursuance of which decree the said John Gravier was put in peaceable possession of the said alluvion, and the said mayor, aldermen and inhabitants were perpetually enjoined from disturbing him therein; and your petitioner shews that since the rendering the said judgment, he hath purchased from Nicholas Girod, and the trustees of Peter Delabigarre, under the title of the said John Gravier, and from the said John Gravier himself, in all, for the sum of eighty thousand dollars and upwards, all that part of the said plantation and alluvion, which is bounded on one side by the road, and on the other by Mississippi river, and extends from the limits of the city to the street called *Rue Julie*, of which your petitioner was put in possession and on which he has expended very large sums in improvements, and particularly in making a canal and levée, which are nearly complete: That your petitioner is informed, and verily believes, that the president of the United States, being ignorant of the true circumstances of your petitioner's title, but instigated, as he believes, by some malicious misrepresentations of your petitioner's enemies, has given directions to F. L. B. Dorgenoy, the marshal of the district, to remove your petitioner by force from the said piece of land, so purchased by him as aforesaid; and that under colour of an act entitled "An act to prevent settlements being made on lands ceded to the United States, until authorised by law," which law, as your petitioner is advised and believes, cannot

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ed in his possession, as well as the issuing the injunction to prevent the execution of the mandate.

The decree of the court, he contends, is a nullity, and is void for three reasons.

1. Because the United States were not a party.

2. Because the court had no jurisdiction of the subject of the suit.

3. "Because it was the result of a process and a course of proceeding and trial belonging to a court whose powers they do not possess by law."

The two last of these objections affect the powers of the court, and (should they be well founded) render the judgment void as to all the world.

apply to your petitioner's case, as by a reference to the said law will more fully and at large appear.

That if your petitioner is dispossessed at this season of the year, the greatest injury will result to him not only by the destruction of the unfinished works, by the annual inundation which may now in a few weeks be expected, but also by the failure of many contracts he has formed, and by the loss of the revenue arising from his canal and basin, for the next year.

And your petitioner shews, that the navigation of the river will be greatly impeded by the half finished works, and that the greatest danger is to be dreaded to the health of the city from the existence of a temporary dyke which it was your petitioner's intention to have removed prior to the rising of the waters—Wherefore and inasmuch as the said order must have unadvisedly issued, as the same is contrary to the treaty by which this country is ceded to the United States, to the laws thereof, and to the constitution, and particularly to that article which declares that no private property shall be taken for public use without just compensation; and also in direct violation of that part of the ordinance for the government of this territory, which directs that no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.

May it please your honours to enjoin the said F L. B. Dorgenoy, marshal, from executing the said order, and to grant to your petitioner such other relief as the nature of his case may require.

EDW. LIVINGSTON.

Signed and sworn to in open court,
January 25th, 1808.
J. W. SMITH, Clk.

Let an injunction issue agreeable to the prayer of the petition. 25th January, 1808.

GEO. MATTHEWS, Jun.
JOSHUA LEWIS.

I hereby certify that the foregoing is a true copy of the original petition and order on file in this office.

J. W. SMITH, Clk. S. C.

March 28, 1808.

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The first, if the United States were a necessary party, will render i vo d as to them, but good against all others who were parties to the suit.

I have admitted that the United States, if they claimed an interest in the land in their own right or for another not a party to the suit, would not be affected by it. The law cited by Mr. Jefferson is a first principle in the civil, and, as far as my knowledge extends, pervades every other code. But the case would, I think, be different, if the United States claimed not for their own use, but for that of persons who were parties to the suit.—When once a contest is decided by a sentence of the *proper tribunal, regularly judging in the last resort*,—that decision is final, it becomes *res judicata;* for, it is the interest of the commonwealth that there be an end to litigation, "*interest reipublicæ ut sit finis litium;*" and therefore though the judgment be erroneous it must stand.—The principle cited by Mr. Jefferson, is an exception to this rule—the *res judicata* does not bind those who were not parties to the suit; and the reason is, that they had no opportunity to defend their rights. But if the person applying for the benefit of this exception in order to open the judgment, claims no right for himself, but only asserts it for the benefit of another who was a party to the suit, and had an opportunity to defend his rights and did defend them, then the reason of the exception failing, the exception itself must fail with it. *Cessante ratione, cessat et ipsa lex.*

To apply these principles to the case before us: The corporation of the city of New Orleans were parties to the suit in question; they defended their rights, they were heard, they set up, in a motion for a new trial, that very title in the United States which is now contended for, as a bar to the plaintiff's recovery. On a full hearing the court determined against this claim, enjoined them perpetually against asserting it, and quieted the adversary possession. Now let us examine what is the claim of the United States. If *on their own account*, I admit they are not barred; if *for the city of New Orleans*, I contend thev are. The purpose for which an act is done, is to be gathered from the declarations, either oral or written, of the actor, or from his conduct. Where the public is the actor, the declarations and conduct of their representative in the act are to be looked to; the president in this case was, as he says, the agent of the United States.

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What were his declarations, and what was his conduct? Immediately after he had notice that his orders had been obeyed by the marshal, he sent a message to congress, which he transcribes p. 77 of his work. Speaking of this property he says: "*It has been used immemorially by the city*, to furnish earth for raising their streets and court-yards, for mortar and other necessary purposes, and as a landing or quai," &c.; he next states as an allegation that the title, originally in the former sovereigns, was never parted with by them, but was retained by them *for the use of the city* and province, and consequently has now passed over to the United States. And he adds; "Until this question can be decided under legislative authority, measures have been taken according to law, *to prevent any change in the state of things*, and to keep the grounds clear from intruders." Here is no allegation whatever of any *beneficiary interest* in the United States; on the contrary, a prescriptive title to the usufruct in the city of New Orleans, and an allegation of a mere *trust title* in the former sovereign, to which the United States have succeeded; and the intent with which the possession was taken, is plainly expressed to be for *the use of the city*. It was (says the message) to prevent *any change in the state of things*.—What was the state of things alleged? Why, the use of the property in the city. The president's message, then, as clearly as language can express any thing, tells us that the United States claimed nothing for themselves, every thing for the corporation of New Orleans.—It does more; it informs us, what is exactly the fact, that a court, which I shall shew to be a competent one, having decided on a question of title, the president of the United States interposed his executive authority to correct the errors of the judiciary, and seized the property in question to restore it to the losing party; for he tells congress: "This (the *batture*) having been claimed by a private individual, the city opposed the claim on a supposed legal title in itself, but it has been *adjudged that the legal title was not in the city*." Here, then, is an acknowledgment that judgment was rendered against the claims of the city, and this passage, taken in conjunction with those I have quoted, amount to this: The city have a title to the use of this property, they have used it immemorially; it is therefore theirs by prescription—but an individual has claimed it, and the court has wrongfully given judgment in his favour; I have therefore turned this individual out of possession in order to restore that of the city, in other words

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to prevent any *change in the state of things*. On this supposition alone of a claim for the use of the city, can we reconcile Mr. Jefferson's assertions pages 63 and 76, that after the passage of the territorial law, it was in my power to resume my works, by obtaining permission from the jury, and that had I obtained that permission it would have been respected by the national executive. Had the seizure been for the use of the United States, how could a compliance with any territorial regulations enable me to continue the occupation of the property of the United States? How could the *national executive* have had so much respect for the permission of a parish jury, as to suffer the public lands to remain in the hands of an intruder? It is clear, therefore, from all these declarations that the agent of the United States did not seize for their use but for that of the defendants in a suit that had been decided. His acts speak the same language. From the time of my dispossession to the present moment (with a short interval of a few days, during which I resumed the possession in the fall of 1810) *the United States have made no other use of the property than to keep me out, and suffer the city to enjoy*. It would have brought, if sold, some hundred thousands of dollars into the public treasury, yet no attempt has been made to sell; if leased, it would have produced a rent proportionate to such a capital, yet it remains unimproved. The city draws a great annual revenue from the wharfage, digs up the soil when the river retires, and, until it was destroyed by the last year's hurricane, occupied by their guard the house I had erected, though the United States hired buildings for their troops.—All this conduct coincides with the declarations of the executive and plainly shews for whose benefit he acted—and as the rights of that body have been already decided on in a cause to which they were parties, the question as to them can never be legally revived either by themselves or others for their use. Until therefore the United States shall assert some claim of title for themselves, not as *fiduciaries* for the party which is concluded by a former judgment, that judgment binds them.

2. But the court had no legal cognisance of the case, having no jurisdiction over the subject of the suit,—and to prove this we are referred to p. 68, where I find it stated expressly, that "so long as the nation holds lands *in its own possession*, so long they are under the jurisdiction of no court but by special provision;" which special provision, it is contended, is not made in the United States, but that when they come to the

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possession of individuals, then the courts are open for the discussion of contending claims. Now, as Mr. Jefferson in his message and elsewhere in his book, tells us that the *city of New Orleans were in possession*, he excludes that of the United States, and shews a case in which by his own acknowledgment the courts may legally decide on the title. I think this a conclusive answer to this head of objection; there are others which I have been obliged to anticipate, to which I refer the reader.*

But it is urged,

3d. That the judgment in the case of Gravier, as well as the injunction issued against the execution of the president's mandate, are void, because "They are the result of a process and course of pleading and trial belonging to a court, they (the territorial court) "did not possess by law."—In support of this objection we are told, that by an ordinance of Congress of the 13th of July, 1787, made for the then territory of the United States N. W. of the Ohio, but extended to Louisiana shortly after the cession, it was provided that there should be in that territory a court consisting of three judges, who should have "COMMON LAW jurisdiction," thus excluding, by a necessary implication, the powers and forms of proceeding of those courts which are known in England and in the United States by the name of *Courts of Chancery*, and in our system of jurisprudence are contradistinguished from those which proceed according to the course of the *English common law*. Thence Mr. J. argues, that the superior court of the territory of Orleans, having no *chancery powers*, could neither issue an *injunction*, nor render a decree to *quiet a possession*, nor try a cause without a jury.

This is, evidently, a play upon words, and the whole quibble turns upon the words "*chancery*" and "*common law.*" Mr. Jefferson confesses, (p. 74) that, the latter, as applied to Louisiana, do not mean the "common law of *England*," but "the common law of *this land*," which he acknowledges to be the Roman† or civil law. This is all I desire. I acknowledge

* Ante, p. 257, et seq.

† One of the first acts of the territorial Court, after the transfer of possession to the United States, was a solemn determination that the change of government operated none in the municipal laws. This determination has been uniformly acquiesced in since, and has lately received the sanction of the supreme court of appeals of the state. The common law of Louisiana is therefore established to be the civil or Roman law; and the constitution of this state contains a special clause expressly intended to guard against the introduction of any other system of civil jurisprudence.

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that the superior court of Orleans is not a court of chancery, and that it has no powers whatever as such. Mr. J. acknowledges that it possesses the powers of a court of civil law; now, therefore, the only question seems to be, whether such a court has the power to issue an injunction, or quiet a possession, and whether it usually proceeds with or without a jury. Mr. Jefferson triumphantly asks: "Was the establishment of the French and Roman laws an establishment of the chancery system of law?"—The answer is obvious.—It was so, as far as those several systems are similar, but no farther. He again asks: "Will it be said that the Roman and chancery laws, for instance, were the same?" If Mr. Jefferson does not know that the English chancery system was borrowed from the civil law, and that it professedly pursues its forms and modes of proceeding,* I must assent to what he acknowledges in several parts of his justification, that he is not deeply versed in the Roman, to which I think I may add, at least, the English chancery system of jurisprudence. But, however that may be, the question is not here whether the rules and modes of proceeding of the courts of civil law and those of chancery courts are the same, but whether the forms pursued in the case before us were really those which are prescribed and pointed out by the "common law of the territory of Orleans" (which is acknowledged to be here the rule) or in other words by the "Roman civil law?" And, now, it is easy to shew, that there was no need in this case to search or adopt the precedents of an English or American court of chancery, and that neither the action brought by Gravier, nor my petition for an injunction against the marshal were derived from that source; but that they were suits and modes of proceeding as well known and as strictly defined in the civil, as those of *trover* and *ejectment* are in the common law.

It is a fact well known, not only to professed civilians, but to all those who are tolerably conversant in that system,

* This is so well understood in the United States, that by an act of Congress, passed on the 29th of September, 1789, it was expressly enacted, "That the forms and modes of proceeding in causes of equity (chancery) and of admiralty and maritime jurisdiction, should be according to the course of the *civil law*."—This statute has, indeed, been since modified, and the forms of proceeding of chancery courts prescribed by more general words; (2 Laws U. S. 103), but it has never been doubted or denied, that those forms are derived from, and in general conformable to those of the *Roman law*.

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that all those objects which are attained after great expense and much difficulty in the English courts of equity, are effected without the complex machinery of different tribunals by the simple practice of the civil law, by the division of actions into those *stricti juris*, and *bonæ fidei*, and the application of the *prætorium jus* to their circumstances; but that disquisition is here unnecessary, for the proceedings in question belong to the most ordinary class, in the code of practice.

INTERDICTS were edicts made by the prætor, declaratory of the remedy he would give in certain cases, chiefly to preserve or restore possession. They were also his decretal orders applying an equitable remedy to the case before him, and in a third sense the term was commonly used for the action which is brought under the prætor's edict.* Thus we say *the interdict undè vi forbids illegal force*, here it means the edict. *The judge rendered an interdict against the use of the servitude*, here it means the decretal order which may be either interlocutory or final. *Titius prosecuted an interdict undè vi against Caius to recover his possession*, here it means the action.†

These interdicts were prohibitory, restitutional, or exhibitory. Of the first kind were those by which the prætor forbid the commission of any illegal act which was apprehended. By the second a remedy was given for acts already done; the third was a process analogous to the writ of habeas corpus, obliging the party having a free person in his custody to exhibit him.

All these remedies were applied by a process, which, to avoid the equivoque that would arise from employing, as in Latin, the same word to signify the edict and the process under it, we call in English an *injunction*. In the prohibitory and exhibitory interdicts it issues at the commencement, in the other at the end of the suit, and so far in the former instances, it is exactly analogous to the chancery injunction of England.

The suit brought by Gravier against the corporation of the city, was an interdict of the prohibitory kind; he was in posses-

* Vide Dig. de Interdict: et Calvini Lexicon, *passim*.

† Interdicti appellatio obscura est iis, qui rem ex antiquitate non satis fideliter perpendunt; ecce autem, sicut duplex censetur bonorum possessio, videlicet edictalis et decretalis; ità docendi gratiâ, statuimus duplex hâc consideratione interdictum: scilicet *edictale*, quod prætoriis edictis proponitur, ut sciant omnes eâ formâ posse implorari; et *decretale*, quod prætor pro re natâ implorantibus decrevit. *Oldendorp*, cited by Calvin.

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sion, the defendants had disturbed him, by trespassing on his property and setting up a claim to a *servitude* or commonage on it: his remedy was clearly pointed out by law, without any need of chancery aid; he brought a suit under the prætorian edict *uti possidetis* and obtained the interdict or injunction of the magistrate, forbidding the defendants from continuing their disturbance during the continuance of the suit, and at the end of it, after hearing all parties on the question of title, the same order was continued, or as we should express it accurately in English, the plaintiff was *quieted in his possession*, and the *injunction was made perpetual*.—The only illegality then, of the whole suit, is having translated *interdict* by the word *injunction*, and having used the familiar phrase *quieting in possession*, to express the very idea which those words were meant to convey. Those who are acquainted with even the rudiments of the civil law, will ask no authority for what I have asserted, but I wish to be justified by all, and I therefore state the nature of the action, and shew the law on which it is founded.

"Hoc interdictum (*uti possidetis*) de soli possessore scriptum est, quem potiorem prætor in soli possessione habebat: et est prohibitorium ad retinendam possessionem." Dig. 43. 17. 1. s. 1. "This interdict is made for the possessor of the soil, for his possession is favored by the prætor; and it is *prohibitory* for the purpose of retaining the possession." Godfrey's note on this passage is: "in hoc interdictum venit ut reus desistat à turbatione præsenti et futurâ." "This interdict provides that the defendant shall desist from all disturbance at present *and in future*."

"Hoc interdictum duplex est, et hi, quibus competit et actores et rei sunt." "This interdict has a double effect, and the parties under it are both plaintiffs and defendants." Dig. 43. 17. 3. s. 1.—From these authorities (and I might multiply them without end) it appears that there was a course of proceeding in force in this country, by which one who was troubled in his possession might apply for and obtain an order of the judge enjoining his adversary to desist from his encroachment, or in other words obtain an *injunction*, and that, after the title was determined, that order might be extended to all *future* aggressions, that is to say *the injunction might be made perpetual*.

Now, this is exactly the course that has been pursued. Gravier being disturbed in his possession, by the city of New Or-

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leans, commenced his suit, not by *bill in chancery*, as I shall presently shew, but in the manner prescribed by law for the prosecution of all suits.—He obtained an *interdict* directing the defendants to desist from trespassing on the lands in question, *pendente lite:*—the defendants appeared, denied the plaintiff's possession and his title, and set up one in themselves;—the case was heard, and the court being of opinion that Gravier had both the possession and the title, ordered the interdict to be made perpetual, and declared that he should be protected against the defendants in the peaceable enjoyment of the premises forever. Now, what is the objection to this course of proceeding? Why, truly, the judges have rendered their orders and decrees *in English!* They have translated *interdict* by *injunction*, and have *quieted a possession*, instead of ordering an *interdict* against future disturbance. The vivid imagination of our author was fired with the illegal use of chancery terms. Anxious to support the constitution, and keep every branch of government *except one* within the bounds of their duty,—he takes pains to prove to the judges that they are not chancellors, reproaches them bitterly and indecently for "*shuffling themselves* into the place of the jury," and raves about chancellor Waltham, and his *subpœna*, just as if the *subpœna* had been used in the case; nay, he actually asserts it as a fact, when it exists no where but in the series of fictions which he calls "*the proceedings of the executive.*"—The same law which authorised the granting and continuing the injunction in the case of Gravier, justifies the Court in the order given to the marshal on my application.—I was in lawful and peaceable possession, and I knew that an illegal mandate had been given to deprive me of it; mine, therefore, was the very case provided for by the interdict *uti possidetis*, and it is their having dared to grant me the benefit of the laws of my country, that has drawn upon the judges the ire of the President.

They granted the injunction, as it was their duty to do; the marshal, disregarding that which he owed to the laws, and supposing himself, as he has stated, bound to the same obedience which a soldier owes to his officer, disobeyed the injunction, and, by force, executed the orders of the president. Here was a scene which, for the honour of my country, for its most sacred interests, I pray never to see repeated; an executive

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officer carrying into effect an executive mandate, in contempt of the solemn decrees of the judiciary, and the president ordering the regular military force to aid him in the accomplishment of this outrage.—Let it not be said, that he could not know that the court would interpose—but he *did* know that the court had interposed: he *had* seen their judgment, and it was in direct *defiance* of this judgment that he gave the order. Besides, he afterwards *knew* the act, and made it his own by his *ratification*. He even now *justifies* it, and though all the probable consequences were stated to him of a conflict between the authorities, he heard them in sullen silence.* There is then as little justification for Mr. J. as

* After I had received the president's determination, in 1808, not to grant me any relief, I wrote to the secretary of state the following letter:

Washington, July 13, 1808.

Sir

In the letter I had the honour to address to you on the sixth of May last, I offered propositions, which, after making every allowance for the illusions of self-interest, I cannot but think highly evincive of the justice of my claim.—They were also intended to shew the confidence I then felt, that the president would seize the opportunity they offered, of reviewing a determination made on an *exparte* statement, which I have offered, and am ready to prove false in fact and erroneous in law.

It having been deemed inconsistent with official duty to examine my proofs, or to listen to my argument, I must at present content myself with the consciousness of having done every thing that a sense of justice, and the extreme of moderation, could require. The representatives of the people, to whom I am referred, must determine whether they are competent to the trial of a title, and whether they intended to invest the executive with the power of reversing the decision of a court, of opposing the execution of its decrees, and depriving a citizen of his property, without even the form of a trial, or affording him the means of defence.

I must however, sir, be permitted to draw your attention to another circumstance in this business, which is of the utmost consequence not only to me, but to the territory in which I reside. From the verbal communications which I had the honour to make to you at this place, supported by a copy of the record, which I delivered for the president's perusal, it appeared that when I first heard a warrant had been received by the marshal to divest me of my property, I applied by petition to the superior court who, on hearing, granted me an injunction, ordering the marshal to desist from the execution of the warrant; but that this officer, supposing the authority of the president paramount to that of the court, proceeded to execute his orders. For this contempt offered to the highest judicial authority in the country, I might have obtained an attachment and an order for restitution; but I was unwilling to exhibit to the inhabitants of the territory the degrading spectacle of a court unable to execute its decrees, or the afflicting one of a violent struggle, perhaps a bloody conflict between the ministerial officers of judicial and executive power. Persuaded

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there is foundation for the charge, that the court assumed illegal powers; they proceeded in the beaten track of ancient usage and established law; he deliberately and violently opposed their legal course of proceeding.

But no jury was called for the decision of the cause! *The judges shuffled themselves into the place of the jury!* They have "abolished the trial by jury, pledged by the ordinance to the

that the warrant had been issued in consequence of some gross misrepresentations of facts, I desisted from any further prosecution of my appeal to the laws, and thought that propriety required me to suspend any to the public, until I should have endeavoured to rectify the errors under which I supposed the president had acted. With this view I applied myself silently and assiduously to the removal of those pecuniary difficulties, which this unexpected change in my fortune had produced, and, as soon as this was sufficiently effected, came on with a hope bordering on conviction, that when heard (which I considered as a matter of course) I could demonstrate to any reasonable man, not only that I had been hardly dealt with in the mode of proceeding, but that there was not even a colour of title in the United States to the land of which I had been deprived. As however it has not been deemed expedient to admit even a possibility of error or misreprentation; as the appeal which I have made to the candor of the executive has failed, it may become necessary for me to prosecute that which I have made to the justice of the courts. But this statement will shew you, sir, how important it is for me to ask, which I now most respectfully do, whether it is the intention of the president that the marshal shall use the force placed at his disposal to oppose the decrees of the territorial judiciary? If, as I hope, and would wish to believe, the ordinary course of justice is not to be interrupted, I have only to request that orders, conformable to such intentions, may be sent to the marshal, whose conduct has shewn that he is under a contrary impression—and it would be desirable to avoid that opposition to which his mistaken sense of duty might lead. But if the president's warrant is to be supported by force against the process of the court, I ought to be apprized of it, that I may then determine whether the obligation I owe to my family or my professional duty, to a widow and two orphans, whose rights are committed to my care, will permit me to sacrifice their interest, in order to preserve the peace of the territory; or whether I should assert my claims, and leave the responsibility where it ought to rest.

If the United States have no title to the land, no reproach can attach to me for any event that may happen, and I am prepared to risk every thing on that question, whenever it shall again be decided by impartial and enlightened men. Being about to depart in a few days, and wishing to carry the president's determination on that point, I beg that, as soon as may be convenient, you will favour me with an answer, and at the same time return the copy of my petition for an injunction, which I had the honour to deliver you at Washington.

I have the honour to be,

Respectfully, &c.

(Signed) EDW. LIVINGSTON.

To the part of the letter relating to the injunction, I received *no answer*.

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people of the territory." "They took upon themselves to decide both fact and law, aware at the same time, that a jury could not have been found in Orleans which would not have given a contrary decision."—These are serious charges. They affect the character of men whom Mr. J. calls *respectable*, though he attributes to them a conduct that would disgrace them for ever, of men whom he had invested with the highest judicial authority, and to whom it has been continued* by the representatives of the very people whose privileges he accuses them of having destroyed, and whose interest, he says, they have illegally sacrificed by this decision.

When deceived by false appearances, such accusations are made under a belief of their truth, the author incurs the reproach of precipitancy, and owes a reparation to those whom he has injured.—Where there is no proof, and he acts only on suspicion of the fact, his offence assumes a graver cast. But what name shall we give to his conduct, who *knows* that the charge he makes is wholly without foundation, who *acts* without proof and without suspicion, who *repeats* serious charges after he has *seen* their refutation, and *knows* that refutation to be *just*.

I have shewn that the form of action as well as the process was in the usual routine of judicial procedure: that no chancery or other extraordinary jurisdiction was resorted to, and I now proceed to show, that this course did not deprive the defendants of an appeal to a jury; that if they declined it, it was the result of deliberation and choice; that there was no *shuffling* on the part of the judges, no assumption of illegal power, and that he who makes the charge had, at the time he wrote, under his eye the evidence of its falsity.

The act of the 26th March 1804,† gave us our first form of government. On the subject before us its provisions are: §5. "In all cases, civil and criminal, in the superior court, the trial shall be by jury, *if either of the parties require it*."

On the 2d March 1805,‡ the president was authorised to establish a government in Orleans, similar to that exercised in

* Judge Mathews is one of the judges of the supreme court of appeals, and judge Lewis presides in the district court of the first district of the state of Louisiana.

† 7 Laws U. S. 112. ‡ Ibid. 281.

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the Mississippi territory (*except as is otherwise provided by the act*) and giving to the inhabitants all the rights, &c., secured by the ordinance of 1787. But the fourth section declares, "That all laws in force in the said territory (Orleans) at the commencement of the act, and not inconsistent therewith, shall continue in force until altered, modified or repealed by the legislature;" and the sixth repeals, after the first November then next, all such parts of the former act, as are repugnant to the present act.—The ordinance, which is thus made the constitution of the new territory, secures to the "*inhabitants the benefit of the trial by jury.*"—This benefit, it was supposed, would be secured to them, if they had the option of recurring to it; and that part of the law of 1804, which directed that, in civil cases, either party might have a jury trial, *if he required it*, was not inconsistent with the provision of the ordinance, which secured the benefit of a jury trial to the inhabitants, and that, therefore, this clause was not repealed.—Under this idea the territorial legislature proceeded to regulate the proceedings in the superior court. By the first section of the act passed for this purpose,* all suits are directed to be "commenced by petition addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action, with the necessary circumstances of places and dates, and shall conclude with a prayer for relief adapted to the circumstances of the case."—This was exactly done in the case of Gravier, and even if I had not shewn that the form of action adopted had been previously known to the civil law, this provision in a positive statute must have put an end to the cavil.—The fifth section enacts, that if the "*Defendant wishes a trial by jury*," his "petition shall conclude with a prayer to that effect;" and if any plaintiff requests a trial by jury, such request shall be lodged in writing with the clerk, within three days after receiving notice of the filing of the defendant's answer,"—and thereupon the clerk is to issue process, and the sheriff is to summon the jury.—As there is no difference in the mode of commencing causes, all of whatever nature being by petition, the provisions relative to the trial by jury are applicable to all; whenever a fact is in issue, either of the parties may refer its

* 10 April, 1805. 1 Orleans Laws, 210.

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trial to a jury; and it is, therefore, only in cases where both prefer the decision of the court, that the court decides. This *now is*, and *always since the passage of this law has been* the uniform unquestioned practice of the court. The corporation of the city of New Orleans, on being served with a copy of Gravier's petition, were at liberty to demand a jury or submit to the decision of the court. They had time to deliberate until the filing of their answer. They did deliberate, and, with the advice of their counsel, preferred the latter mode of trial, as the most favourable to their interests.—Does not this plain exposition of the law shew that there is not the slightest foundation for the invective and bitter reproach with which the judges are assailed on this subject?—Can any one acquainted with the laws I have cited, for a moment question the regularity of the proceeding?—But Mr. Jefferson was acquainted with them. Those from the statute book of the United States were passed during his presidency; he *approved them;* he *quotes* them in the very page that contains his philippic against the judges. The territorial law also passed during his presidency, and must have been officially transmitted to him by the governor. Nay more, his attention was called to them, and to the refutation which they give to the calumny he has revived; it was called to them by a publication which I have said was under his eye when he wrote. The same argument had been thrown out, not as I recollect in any publication, but in suggestions calculated to influence the ignorant: I had answered it in a publication made first in the papers of New Orleans, and afterwards repeated twice, first in the appendix to my address, and a second time in one of the arguments of Mr. Duponceau.* Both these publications were in Mr. J.'s hands, and to the first of them he frequently alludes in the course of his justification. This is the extract:

"But the cause,—says the voice of public clamour,—the "cause was tried by the court without the intervention of "a jury. None but the grossly ignorant, or the perversely "wicked, can make this a ground of accusation against the "plaintiffs.—The trial by jury, in civil cases, is a privilege "which by the laws of the territory either party may claim at "their pleasure. When neither demand it, the privilege is of "course waved. Here the defendants have not even inadvert-

* *Review of the cause of the New Orleans Batture*, &c. Philad. 1809. Reprinted in the American Law Journal, vol. 4. p. 517.

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"ence to plead; the mode of trial was a matter of *deliberation* "*and choice*, for I have seen the draft of an affidavit which "judge Moreau, the defendants' counsel, told me he was about "to make, in which he gives a reason why they did not chuse "to ask one; and this reason, if I recollect aright, was that they "apprehended they would not be permitted to have a jury com- "posed of inhabitants of the city (that is to say of the parties "to this cause!) What would have been said of the defendants "if *they* had testified even a desire to have persons interested "in their purchase, not only examined as witnesses, but sworn "as jurors in the cause? Nothing, indeed, *could* have been add- "ed to the obloquy which has been cast upon them; but if such "*had been* their conduct, I should candidly confess there is "little of it they would not have deserved."

Orleans Gazette, Nov. 16, 1807.

This publication, let it be remembered, was made in 1807, in the Gazette of New Orleans, it had been twice republished; if the law or the practice of the court had been misrepresented, would not some reply have been made? if the communication made by Mr. Moreau had been misunderstood, would not some explanation have been given? Not a word has been or could be said on the subject. The law was truly stated, the fact was well understood; and with the knowledge of both, Mr. J. has not scrupled to wind up his work by repeating the serious charge which they fully refute.

The task I had imposed on myself is now finished, and I commit with satisfaction my cause to the public. It is not one of mere interest either to me or to my adversary; as he has managed it, the question involves considerations of higher moment to us both: I am an intruder on the public, or he an invader of private rights.—The only true enquiries were, Was the land in question the property of the United States? Had the president a right to seize it if it were? A dignified defence would have been confined to the support of an affirmative answer to these propositions;—Innocence would have rejected the doubtful advantage to be derived from even a just attack; Integrity and Honour would have disdained the aid of unjust accusations, however plausible; Magnanimity would have scorned the effect of an appeal to popular prejudice:—but in this case we look in vain for these results. All these means, however unworthy, are resorted to; and in order to prove that the land be-

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longed to the public, and that I was rightfully expelled at the point of the bayonet, the public are told:

1. *That the premises did not belong to John Gravier, under whom I claim, but to him jointly with his brothers and sisters.*

To this I have answered that if true it forms no justification; that the property of the brothers and sisters ought to have been as sacred as that of the seller to me.

That the fact is not true, that the whole of his deceased brother's estate, of which this formed a part, was inventoried and sold to John Gravier, and

That the absent heirs have ratified the sale.

2. *That my counsels first suggested to Gravier the prosecution of a dormant claim.*

To this accusation I have replied that if the claim were just, I consider it as no reproach, to have given my aid to its prosecution, and that to point out his rights to a client, is one of the first duties of an advocate.

But that the allegation, whether it constitute a merit or a reproach, is totally without foundation.

That Gravier's ancestor, ten years before my arrival, so well knew his right to this property as to sell several parcels of it by public recorded acts.

That Gravier himself, long before my arrival, had enclosed a very large portion of it.

That, before the purchase in which I was concerned, two very respectable gentlemen in the city, were in treaty for the same property, and

That even before the cession the Spanish governor thought it necessary to procure Gravier's license, before he could make use of the ground for a public purpose.

3. *It is objected that Delabigarre's purchase was of a litigated right, and therefore void and* CHAMPERTOUS.

To this also I have answered, that, if the charge were true, it gave no right to the United States, and that all the crimes he could heap on the memory of the unfortunate Delabigarre, would not lessen the weight of his own responsibility, in taking for the public that which did not belong to them.

But I have shewn that the charge is unfounded as well as irrelevant:

Because Gravier was in actual possession of a part of the thing sold.

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Because he had a constructive possession of the residue.

Because no one had then heard of the only adverse claim which now exists.

Because the claim of the corporation was an illegal one, and has so been determined by a final judgment, and even by their own acknowledgement.

Because, even if a just claim, as it was only of a servitude, the proprietor might legally sell the soil.

And I have shewn that the suit could only have been carried on in the name of Gravier, because the sale under private signatures amounted by the law of the land to no more than *a covenant to* sell.

4. *It was asserted that if, by the terms of his grant, Gravier was the owner of the alluvion, he had disposed of it to the purchasers of the front lots, by using the same expression in his sales to them.*

For the fourth time the answer was repeated, that if the fact was ascertained, it only changed the name of the person aggrieved, and that the offence of illegally taking the land, was as great if the title were in A, as if it belonged to B.

But a complete refutation of the fact, was given by shewing that in general the front proprietors' deeds referred to a plan which made them limited and not riparious proprietors.

That in cases where there was no such reference, and where the alluvion was really granted, I had become the *purchaser* and united both titles.

Preparatory to the discussion of the title of the United States, I have shewn from the geology of the country, the nature of its conformation and the characteristics of the premises in question —the gradual formation of similar parcels of land, and the uniform occupation of them by the proprietors of the adjacent soil has been proved, as well as the utility of the improvements I was making; and it was demonstrated from a review of the original grant, and the chain of title, that those under whom I claimed owned and possessed to the water's edge.

The enquiry by which law the question of title was to be decided has been pursued, and strong reasons given to believe that the President erred in selecting the French rather than the Spanish code.

But that taking the French laws to be the rule in this case,

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they give the alluvions not to the sovereign but to the adjoining proprietors; and this is proved:

By the opinion of their jurists, the decisions of their tribunals, and the formal recognition of the sovereign in the celebrated Bordeaux case.

I have shewn that the premises have no one characteristic, by which they can be denominated the *bed* or the *beach* of the river, and that if a part of them still form the bank, that bank is *acknowledged* and proved to be private property.

The distinction attempted to be taken between the right to alluvion in urban and in rural estates, has been discussed and proved to be without foundation.

The nature of alluvial increase has been defined, and by its application to the premises in question, the fanciful derivations and reasoning created to shew that they could not be called an alluvion have been exposed.

The rights of the public to the use of the bank for the purposes of navigation have been acknowledged, while the property of the soil has been proved to reside in me, and from the most convincing documents I have demonstrated that my works did not tend to interfere with, but on the contrary to facilitate that public use.

The singular idea that the President of the United States is required or authorized to abate nuisances in the city of New Orleans, has been exposed to the derision it deserves, and the flimsy nature of this subterfuge has been shewn:

By the words of his warrant of dispossession, which speaks of an intrusion upon public lands, not of the abatement of a nuisance—

By the conduct of those who executed it, in removing the possessor and leaving the works which are supposed to be nuisances—

By the awkward manner in which this plea is pushed forward for the first time in the last stage of the controversy.

The existence of any nuisance has been denied, and the efficiency of local laws for its removal, had it existed, has been shewn.

The assertion that all governments maintain the right of seizing their own at *short hand* has been fully disproved by reference to the English, French, and Spanish laws; and it is shewn by a review of the principles of our own constitution, that they do not sanction the practice.

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The authority assumed under the law of 1807, has been examined, and the following conclusions have been drawn—

That the case to which it was applied, comes neither within its letter nor its spirit.

That even if its circumstances came within the purview of the law, some of the most material provisions of that law have been totally disregarded.

And that if the law authorize the proceedings had under colour of it, the law itself is unconstitutional and void.

The conduct of the territorial judges who rendered the sentence in favor of Gravier has been vindicated, and the charge of their having assumed illegal and unusual powers has been shewn to be produced either by an utter ignorance of the law, or a culpable misrepresentation of it.

Having thus laid my own title, and that of the United States before the public,—having tested the proceedings of the executive by the rules of positive law, the unbending precepts of the constitution and the unerring principles of free government—and having demonstrated those proceedings to be illegal, unconstitutional and oppressive; I shall now enquire what excuse there is in the plea of honest error, supposing it to have existed, and what grounds there are for believing that the motives were such as could inspire the conscious rectitude which is affected in the close of the work?

First.—Error of judgment is no excuse to an *executive officer*; he must execute the laws at his peril.—In this respect judicial and executive officers have a different responsibility; the judge, unless there be corruption or such a manifest breach of positive statute as supposes corruption, is not liable for a misconstruction of law; but a ministerial officer must execute the law at the risque of making good all damages arising from his misconduct or even his errors.

A sheriff cannot justify the arrest of A, by proving that he took him for B, against whom he had a writ.

The captain of a frigate shall not be excused from damage for bringing in a friendly vessel or one of his own nation, because he thought it the property of an enemy.*

* In cases where this excuse has been deemed good, there was always some default on the part of the captured, which led to the error.

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Nay more: he shall not be excused, although in making the capture he shall have followed the express instructions of the President, if those instructions were not given according to law.*

Mr. Jefferson shews more art than fair argument in putting the responsibility of the executive on the same footing with that of the members of the legislative and judiciary branches.—They are widely different. The representative is only bound to pursue the measures he *thinks right;* he is under no obligation always to think right. The judge is to decide according to law where it is positive; according to *his opinion of it* where it is doubtful. The President has no such discretion, unless it be expressly given, and it cannot be given, under our constitution, in cases properly cognizable, as this is, by the judiciary, in cases of *meum* and *tuum* as I have shewn this to be. There are cases, however, in which a discretionary power might be granted by law, and in which an honest error would excuse.—The legislature might, for instance, create an office, and direct that whenever the President *thought* the officer had been guilty of malfeasance, he might remove him.—Here the President, believing in the ill conduct of the officer, might remove him; and, though the man should be innocent, the President would incur no responsibility,—but if the provision had been, that the President should remove in case of malfeasance only, then he would remove at his peril, in case the misconduct could not be proved.

The United States make a law granting the right to occupy the square in the federal city around the Capitol to an individual; but direct, that in case he shall commit waste, the president shall deprive him of the possession. Can it be doubted, that if the tenant has committed no waste, and the president dispossess him, he will have a right to recover the value of his term, although the president may have acted honestly under a belief of the fact?—The case would be different if the law had empowered the president to dispossess, if, *in his opinion*, the occupant injured the freehold.—Thus, in my case, the law authorizes the president to remove settlers from public lands, and in the exercise of his duty, he removes a man from the possession of his own land; can it excuse him to say, he thought the pro-

* 2 Cranch, 115. Ibid. 176.

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party belonged to the public?—I think not; because that plea would always be ready to justify every outrage, as wilful misconduct is rarely to be proved, and error of judgment will generally be presumed.

The principle, then, I think, is reducible to this:

Error in judgment shall only excuse an executive officer, where he is expressly directed by law to act according to the result of his own opinion.

And that, only in cases where there is no constitutional bar to his being invested with such discretionary power.

But in this case I have shewn, that nothing is either expressly or impliedly left to the judgment of the president, under the law of 1807.

And that if the question of property were by that law referred to his decision, that law would be unconstitutional.

Therefore, error in judgment is no excuse for the act.

Nor will such consequences result from this responsibility, as the apprehensions of the late president have drawn. We shall find men of respectability, talents and integrity, to fill our executive offices, even although it should be determined that they cannot protect themselves against the consequences of illegal acts, by the plea of an error in judgment. The establishment of this doctrine will not, as is supposed, call paupers to the seats of office. But let the reverse be known, let every executive officer fully understand that he may oppress with impunity, provided he will but declare, that if he erred, it was an error of the judgment, and we shall then, indeed, not find "*paupers*" *in office.* The system provides an excellent remedy against that evil,—but we shall find them every where else, and the people, under such a government, would soon be reduced not only to mendicity, but despair. But if this should be a good defence, can Mr. Jefferson use it?—Will the circumstances of this case permit him to say, that he has acted with pure intentions, and according to his own sense of right?—I will not say, that his profession of conscious rectitude is insincere, because none but the Supreme Being can judge the purity of the mind; but this I can say, that if he really think his own conduct to have been legal and meritorious, his sense of right and wrong is entirely confounded, and his principles are even more dangerous than his practice. There are some circumstances, however, in his conduct,

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which, with every charitable inclination, it will be found difficult to reconcile to that purity of intention which the late president professes. A laudable zeal to defend the title of the public to its property, which was invaded, would not have been satisfied with the expulsion of one intruder, while thousands beside him were suffered to occupy the lands of the nation; the constitutional duty of "seeing that the laws be executed" would not have been complied with by enforcing them against a single offender.—Paternal solicitude for the city, and a desire to preserve the free navigation of the river, had they been true motives, would have guarded against every attempt to injure them, and if I shew that others were circumstanced exactly as I was with respect to property of the same description—that the president knew it, that he suffered them to continue their possession, and deprived me of mine,—I then reduce him to the dilemma of confessing that he acted oppressively towards me, or unjustly towards the public, whose rights he was bound by the same duty to enforce without distinction of persons against all, and our belief in the sincerity of his professions must suffer some diminution, when we recollect that the unmolested possessors of this property, pretended to be that of the public, were men of influence and wealth, while the one selected for the display of executive energy was poor, and supposed to be unpopular. The first ground, and, as I think I have shewn, the only ground originally taken by Mr. Jefferson, was that all alluvions belonged by the laws of France to the crown, and that by the transfer of the province, those regal rights were vested in the United States. If he honestly believed this, and thought it his duty to seize property of this description, if by his construction of the law it enabled him to do this at *short hand*, why, I ask, under this sense of duty, and with these means provided for the performance of it, why has he neglected the public interest so as to suffer thousands of acres of this species of land, so manifestly belonging to the nation, to remain in the hands of the wealthy planters who possessed and still possess it, while he chooses in a solitary instance, the property of the widow, the orphan, and the stranger in the land, to manifest his regard to official duty?—Can the "erect attitude of conscious innocence" be preserved while an answer is given to this question? Can any answer whatever be given to it?—He was ignorant, perhaps, of

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other intrusions, mine was the only one officially denounced to him.—Not so—every line he read on the controversy, every traveller who spoke to him of the country, the very nature of its conformation, must have informed him that lands of this description existed in every bend of the river, and as to the denunciation, *that* operated exclusively in my favour; because it was accompanied with documents which shewed that my title had received the sanction of a judicial decision, an advantage which was wanting to the other alluvion lands in the country;—a due respect, therefore, for the judiciary department would have dictated his choice of another *intruder*, if it were true that all the possessors of *battures* merit that appellation.

Was there, then, any thing peculiar in the title to the Gravier tract, which made the alluvion annexed to it more clearly the property of the United States than those accruing to other lands?—No. Let the reader cast his eye on the plan; he will there see that the Jesuit's plantation is divided into five lots, four of which were respectively owned at the time of the seizure of mine, by Mr. *Duplantier*, Mr. *Solet*, Mr. *Robin*, and Mr. *Livaudais*, or persons holding under them, and one by Mr. *Gravier* or his vendees.—Now, as all these portions of the original grant were sold at the same time, under the same circumstances, and by the *same words and mode of conveyance*, to the different vendees and the accession had been formed in the same manner to all of them, there can be nothing in the *title* that could justify a discrimination between the lands of Gravier, and those of the other proprietors. Yet *his* were taken, and the others were left. But the favoured proprietors were among the most influential and wealthy inhabitants of the country. The road, perhaps!—Unfortunately it ran in the same manner in front of Duplantier, Livaudais, and others, that it did in front of Gravier.

The urban and rural distinction!—Gravier's land had become a suburb! so are Livaudais', Duplantier's, Solet's, and Robin's;—not all, I grant, at that period, but all for many years since; yet not one single indication has been given of a claim on the part of government.

But, a care to preserve the navigation of the river! the dangerous works of Mr. Livingston!—Another glance at the plan shews, that if his works were dangerous, those which were suffered without interruption to be completed were much more so. The levée of 1805, opposite to the other suburbs of Du-

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plantier, &c. projects twice as far into the river as mine, and incloses a space of nearly eight times the area. So that if mine were dangerous, this was so in a quadruple ratio. Yet these "*aggressors*" were suffered peaceably to go on with their "*encroachments on the bed of the river*," and are permitted to enjoy the fruits of their labour. No cabinet council is called for them;—no warrants issued,—no troops ordered to be held in readiness, to enforce its execution. Every thing is quietness and calm, while the storm rages the moment I attempt to make the same use of my property they have done of their's: Why this distinction? Can the man who made it, arrogate to himself the attribute of impartial justice?—Can he assume the "*erect attitude*" of conscious innocence?—No;—his true justification is inadvertently given in another part of his conclusion. The act was popular as it respected my lands, and would have been the reverse as respected the others. Mine lay convenient for public use, the others were somewhat more remote. I was supposed to have no influence—that of Mr. Livaudais, and the others, from their great wealth and deservedly high standing, was known to be very great. Hence, the addresses, the newspaper paragraphs, the benedictions (as Mr. Jefferson calls them) of a province.

He has lived, however, one would suppose, long enough in political life, to know the just value of these addresses, on which he so much relies;—most unfortunately, in our government they are proofs of nothing;—sometimes produced by intrigue, sometimes by corruption, generally by party feelings, rarely by good actions;—they are far from forming that kind of testimonial which a prudent man would refer to as a test of the correctness of his conduct. Mr. Jefferson's predecessor in the presidential chair, received, I believe, more addresses than any other man (not excepting WASHINGTON himself) in the same space of time, approving political measures which Mr. Jefferson strongly opposed; and for the reverse of which he himself was addressed from Georgia to Maine. Were all these addresses proofs of public sentiment?—clearly not.—Why, then, does he refer to them? He refers to them because they were uppermost in his mind through the whole course of the transaction; because they were the price of his disregard of the constitution, the motive for his contempt of the judiciary, and the reward of his violation of private right.

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I now take my leave of Mr. Jefferson. In my answer, I have confined myself to his book. Notwithstanding the strong temptations which assailed me almost in every page, I have strictly kept within the boundaries of a just (and, I think, considering the wanton attack) a mild defence. My future conduct will depend much on that of my adversary. I shall continue to reply to every argument that may be addressed to the public on this subject. Knowing that my cause is good, I do not despair even with humble pretensions, to make its justice appear. For this purpose I have always courted investigation; I should have preferred it in a court of justice, but do not decline it before the public.

Though some may condemn me only on hearing the name of my opponent, there are many, very many in the nation, who have independence enough to judge for themselves, and the ability to decide with correctness,—to such I submit the merits of a controversy which has been rendered interesting as well from the constitutional as the legal questions it involves, and on which Mr. Jefferson has, by his management of it, staked his legal, his political, and almost his moral reputation.—That he should not have understood the nature of my title and the different foreign codes on which it depends, is no reproach.—That he should have acted at all without this knowledge, must surprize—that he should have acted forcibly, must astonish us.—But, that he should persevere in the same pretence of understanding the laws of France better than gentlemen bred to it from their childhood, and who, engaged on the same side of the controversy with himself, have abandoned the ground he has taken—That he should obstinately justify an invasion of private property, in a manner that puts it in the power of a president with impunity to commit acts of oppression, at which a king would tremble—That he should do all this, and still talk of conscious rectitude, must amaze all those who look only to the reputation he has enjoyed, and who do not consider the inconsistency of human nature, and the deplorable effects of an inordinate passion for popularity.

EDWARD LIVINGSTON.

New Orleans, 1*st July*, 1813.

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POSTSCRIPT.

A DECISION has at length taken place in a court of justice on the legality of Mr. Jefferson's proceeding.

A suit was brought against the marshal, in the district court of the United States for the Orleans district, according to the forms of the civil law,—the object of which was to obtain damages for the expulsion, and to be restored to possession.

The defendant pleaded the warrant of the president as his justification.

To this the plaintiff demurred, and after argument the Court on the 4th of August last, decided that the warrant was illegal, being unauthorised by the act under which it purports to have been issued; and directed that the plaintiff should be restored to his possession, which was accordingly done. A report of this case will in due time be given to the public.

EDWARD LIVINGSTON.

New Orleans, 1*st Sept.* 1813.

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APPENDIX.

No. I.

Proof that Mr. Gravier had begun to improve the batture before the cession of Louisiana to the United States.

(Translation.)

Deposition of *John Lewis Laurent*, inhabitant of the city of New Orleans, made the 17th March, 1808, before me, the undersigned, justice of the peace:

THE said deponent being duly sworn according to law, doth depose and declare, That about the end of the year 1803 or the beginning of the year 1804, he was requested by Mr. John Gravier to measure off a space of about 400 feet, fronting the square between the streets Julie and St. Joseph, and extending five or six hundred feet towards the river, and that immediately afterwards Mr. Gravier set his negroes to work so make a levée quite round the said space which he had thus measured, and that the said levée was finished in the course of the winter of 1804, and that the said levée exists still so as to be traced in its whole extent.

JEAN LEWIS LAURENT.

Sworn and signed in my presence,
the 18th March, 1808.

B. VAN PRADELLES, Justice of Peace.

No. II.

Proofs that the batture was considered under the Spanish government as the property of Gravier.

LA ROCHE, being duly sworn, doth depose and say, That in the year seventeen hundred and ninety-five, and for some time previous thereto, Laurent Sigur, the father-in-law of this deponent, had a contract for supplying the royal navy of Spain with masts.—That in the spring of the said year, a very large raft of

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masts having come down the river, and that part of the shore below the city where they had been usually placed, being very much encumbered, the said Sigur desired the deponent to go to the governor (then the Baron de Carondelet) to get his directions where he should deposit the said masts.

That the deponent accordingly went to the Baron de Carondelet, with Mr. Lovio, the minister of marine, who, after hearing the statement of the case, directed the deponent to go to Bertrand Gravier, and request him in his (the governor's) name, to give permission to lay said masts on the batture in front of the fauxbourg—adding that if Gravier refused, he would endeavour to find some means of making him consent.

That the deponent accordingly went to Gravier with the governor's message, who readily consented, and the masts were accordingly placed on the batture, where they remained for a long time, at least eighteen months.

And this deponent further saith, that some time after the period above spoken of, and, as he thinks, in the year seventeen hundred and ninety-eight, Bertrand Gravier being then dead, he was again sent on a similar message to governor Gayoso, then governor of the province, who directed the deponent to go to John Gravier, the present proprietor, and ask his permission to lay up the masts on his batture, which the deponent did. Gravier consented, and the masts were accordingly placed on the batture opposite to Mr. Eva's, the captain of the port, and from thence upwards.

And the deponent further saith, that Bertrand Gravier had, for a number of years, a very large brick-kiln, and that he always took the earth for the same from the said batture, and from no other place.

ROCHE.

Sworn to and signed before me,
March 21st, 1808.

B. VAN PRADELLES, Justice of Peace.

Laurent Sigur, being duly sworn, deposeth and saith, that he sent the above deponent La Roche to the governors Gayoso and Carondelet, at the several periods and for the purposes mentioned in the preceding deposition, and that the answers then reported to him by the said La Roche, as coming from the

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Baron de Carondelet, governor Gayoso, Bertrand Gravier and John Gravier, perfectly accord with the statement in the above deposition.

L. SIGUR.

Sworn to and signed before me,
March 21st, 1808.
B. VAN PRADELLES, Justice of Peace.

No. III.

Certificates to the character of the above witnesses, and of Mr. Parisien, mentioned above, p. 133.

I certify that Mr. Laurent Sigur has been well known to me since my first arrival in this country. That he has always sustained the character of a very respectable worthy man, and is a planter residing in the vicinity of this city. And that he was captain and commandant of Iberville under the Spanish government, and was much considered under that government.

WILLIAM C. C. CLAIBORNE.

New Orleans, 10th June, 1813.

City and Parish of Orleans, ss.

I do hereby certify that I have known Mr. Nicholas Roche of the city of New Orleans for several years last past, and that he is a man of good moral character and conduct, that he has resided in this city for more than twelve months, and that he is upwards of twenty-one years of age.

Given under my hand at the city of New Orleans this 24th day of November in the year of our Lord 1809, and in the 34th year of American Independence.

(Signed) L. MOREAU LISLET.

I do hereby certify the above to be a true copy from the original certificate given in the above case.

L. S. THO. S. KENNEDY, Clk.

Nous, Pierre et Ant. Carraby, négociants en cette ville de la Nouvelle Orléans, certifions à qui de besoin peut être; avoir connu le défunt Louis Henry Parisien, pour une des personnes honnêtes avec qui l'on puisse traiter; et qu'avec nous, soit sous

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notre raison soit individuellement, sa probité ne s'est jamais démentie, non plus qu'avec maintes autres personnes, qui, à notre connoissance ont eu affaires avec lui. Délivré sous notre signature à telles fins que de raison. Nouvelle Orléans, le 11 Xbre 1812.

P. & ANT. CARRABY.

Je soussigné, déclare et certifie sous la foi du serment, qu'ayant connu feu Louis Henry, surnommé Parisien, dès l'année 1792; ayant même été avec lui en relations et concurrence d'affaires et d'entreprises publiques assez épineuses, j'ai toujours reconnu en lui un homme d'un commerce sûr, d'une probité et d'une délicatesse à toute épreuve: En foi de quoi je délivre le présent pour valoir ce que de droit. Nouvelle Orléans, le 13 Xbre 1812.

D. D. DES ESSARTS.

(Translation.)

We, Peter and Anthony Carraby, merchants of this city of New Orleans, certify to all whom it may concern, that we have known Louis Henry Parisien, deceased, to be one of the most honest men with whom a person could deal; and in his dealings as well with our commercial firm as with us individually, he never deviated from the line of probity, and was the same in his dealings with many other persons, who, to our knowledge, have transacted business with him. Given under our hands, to serve all lawful purposes. New Orleans, 11th Dec. 1812.

P. & ANT. CARRABY.

I, the underwritten, do declare and certify as if I were upon oath, that having been acquainted with the late Louis Henry, surnamed Parisien, since the year 1792, and having been concerned with and against him in business, and in public undertakings of an intricate nature, I have always known him to be a man on whom reliance could be placed, and whose delicacy and probity could not be shaken. In faith whereof, I have delivered the present certificate, to avail as may be just and right. New Orleans, 13th Dec. 1812.

D. D. DES ESSARTS.

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No. IV.

Proofs that my improvements on the batture were not dangerous, but, on the contrary, would have been highly useful to the city of New Orleans.

We, the subscribers, captains of vessels now lying in the port of New Orleans, do certify, that we have examined the canal constructed, and nearly completed by Edward Livingston, Esq. on the batture of the suburb St. Mary; and we are of opinion, that the said canal, when completed, will be of the greatest use to commerce, by affording a convenient birth for ships and other vessels; and that similar canals, constructed along the whole front of the said suburb, particularly when stores shall be erected on the sides, will greatly facilitate the lading and unlading of vessels, without the expense of cartage. And we are further of opinion, from examining the current of the river at high water, that the said canals will not render the current more rapid, or the harbour more inconvenient or less secure; but, on the contrary, will afford both convenience and safety so the shipping.

SAMUEL ORR, *ship Baltic, of Portsmouth, N. H.*
E. C. GARDNER, *Western Trader, of Philadelphia.*
JAS. PATTERSON, *Moses Gill, of New-York.*
LEVI JOY, *Yorkshire, of New-York.*
CHARLES CLASBY, *Orion, of Philadelphia.*
CHARLES COFFIN, *ship Rover.*
HENRY SAYWARD, *ship Flora.*
A. P. WALSH.
THOMAS POLLOCK, *commander pro tem. Revenue Cutter, Louisiana.*
W. M. HARRIS, *Amiable Lucy, New Orleans.*
WILLIAM TORREY.
Z. BUTLER, *Perseverance, of Philadelphia.*
ROBERT HARRISON, *Catherine, New Orleans.*
JAMES D. NICHOLAS, *Polly, New York.*
PHIL. C. HOGAN, *brig Traveller, New York.*

New Orleans, ——— ——.

SIR,

I hope you will excuse my not answering your note on the subject of the works you had begun, in the front of the suburb St. Mary, sooner; however, I hope my answers to the queries contained therein, are still in time.

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To the first I answer, that I have seen the canal, as well as the other works you had commenced, and the plan exhibited in the coffee-room.

To the second, as to the effect the completion of the plan might have on the harbour, it is almost impossible for any one to say; it is time only can decide that question. But I have no hesitation in saying, that I cannot conceive what injury the shipping can ever receive from the completion of the plan.

To the third, whether the canal, in its present imperfect state, has not been found a safe and convenient harbour for boats, every honest man will answer in the affirmative. What water there may be in the canal I cannot say; but I think there must be at least ten feet; and I am very sure, that any craft lying therein, is less exposed than at the levée. I do believe, that the completion of the plan would be of great advantage to the trade of the western country, in securing the boats from the gales to which they have hitherto been exposed. There is not a year in which a number of them are not sunk; but if the works alluded to were completed, they would be out of danger the moment they arrived.

I remain, with esteem,
your humble servant,
S. B. DAVIS.

New Orleans, April 4, 1809.

SIR,

I have the honour to acknowledge the receipt of your letter of the 10th ult. and should have replied to it at an earlier date, had not my duties compelled me to be absent from the city from that time until the 25th; since which period I have waited in expectation of an opportunity of seeing your plans, and thereby having it in my power to express to you my opinion fully on the subject. As they have not been presented to me, and not knowing the person in whose possession they may be, or to whom I should apply for the necessary information, to enable me to answer satisfactorily all the interrogatories you have, in so flattering a manner, proposed to me, I felt it my duty to inform you of the same: in order (if time should admit) that the person charged with them may present them, and give me suitable explanations; at present, sir, I can only answer your third, and part of the fourth questions.

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"Third: Whether, in its present imperfect state, the canal already made, is not a safe retreat for the river craft; and, whether you do not think it will continue so during months, when high winds mostly prevail in these latitudes?"

"Fourth: Whether this canal, at the present season, and, when completed, at all seasons of the year, would not be a very safe birth for the gun boats of the United States; and whether it would not be a very great accommodation to the service, if two or three such canals were constructed, with adjoining stores for the rigging, &c. of the navy?"

Answer: As a proof that the canal commenced by you, is considered not only a safe, but very convenient retreat for river craft, I shall only state, that at all seasons of the year, when the height of the water will admit, it is filled with river craft, and chiefly those which prefer a *secure* situation, to enable them to make their repairs, and to preserve cargoes of great value; and a similar convenience for the gun vessels, would certainly be a very desirable object.

The effect the completion of your design would have on the currents, as I have not seen the plan, I cannot presume to state; it appears to me, however, that it must already have tended, in a small degree, to increase the eddy on the New Orleans side of the river, and, of course, made the current more rapid on the opposite. Whether this is an advantage or disadvantage to the shipping lying at the levée, I am equally at a loss to determine; and am doubtful whether it does, in any way, affect that part opposite the centre of the city. If it is a disadvantage, it is one I have never yet heard complained of by mariners. An advantage, I should suppose, would result to the city, by the increase of land occasioned by the deposit in this eddy, and the consequent safety of the levée; but on the opposite side of the river, the effect must be the reverse; the river will certainly make encroachments there, as the land on the city side increases. This local effect, however, can be considered of little moment in a river *that is constantly shifting its bed;* and if this was not produced, by the projection of the levées, for the formation of your canals, it appears to me it would be produced, in a short time, by that constant deposit which has already formed, and is daily increasing that part of the batture which appears the cause of so much contention. For it is a well known fact, that when the

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land on one side of this river increases, the opposite side, a little below, is swept away by the current; and this earth is deposited in the next eddy, to form a new point. Thus the river will forever change its bed; and the trifling increase or loss of a few acres of earth on either side, cannot be considered of sufficient magnitude to balance the smallest improvement of utility to navigation or commerce.

As respects the convenience or inconvenience that the completion of your plan would offer to vessels ascending or descending a river of such length, and so full of obstructions and difficulties as this, I cannot consider of any importance; the comparative extent of your plan, taking it on its largest scale, and all its conveniences and inconveniences, must, in this respect, be really so diminutive, as to render them objects of no note. If it did present obstructions or conveniences to ascending or descending, the extent of them could not, I presume, be more than a mile, the $\frac{1}{3000}$ part of the extent of the Mississippi. There is, however, an evil existing, the removal of which would certainly be hastened. The batture now in dispute, in high water forms a shoal, on which vessels frequently ground. If canals are cut there, and levées hove up, the evil will no longer exist. I can say nothing of the enormous sums which I should suppose had already been expended there; and not knowing the extent of your plan, I cannot form an idea of what it would cost to complete it. It, however, appears to me, that the expense that would be necessary in its present state, to clear out the annual deposits of the river, would be very considerable.

Excuse me, sir, for not answering your questions in the order they are placed by you; and I regret that the imperfect idea I have of your plans, should have prevented me from giving detailed answers to the whole.

I have the honour to be,
with great respect,
your obedient servant,
D. PORTER.

Edward Livingston, Esq.

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New Orleans, April 6, 1809.

SIR,

Since I had the honour to write you on the 4th inst. I have seen, at the exchange, your plan of improving the batture in the upper Fauxbourg; have this day examined said batture carefully, and find, that it will always cause a strong eddy below, improved or unimproved. This shoal has but the depth of a few feet of water on it, in the present state (which is nearly the highest) of the river; and as the water which covers it is nearly still, the effects on the currents and eddies must be nearly, and perhaps quite, as great as if levées were thrown up on it; and, indeed, I cannot discover, that any evil could result to the port, should it be improved agreeable to your design. In a few years, the great deposit of the river will certainly produce the same effects as your contemplated improvements. And the only objection I can conceive, is the vastness of your plan. The expense to effect it would certainly be enormous; but, if completed, I am of opinion, it would be an object extremely desirable to all persons having property afloat in such frail vessels as the craft that *descend* this river; and if the design should be carried completely into execution, the upper Fauxbourg would be handsomely ornamented, and the value of property much increased in the part now least improved.

I have the honour to be,
with great respect,
your obedient servant,
D. PORTER.

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AMERICAN LAW JOURNAL.

PENNSYLVANIA: SUPREME COURT.

Habeas Corpus. Dec. 1813.

The Commonwealth of Pennsylvania, on the relation of Charles Lockington, an alien enemy.

vs.

John Smith, Esq. Marshal of the District of Pennsylvania, and Joseph Cornman, keeper of the debtor's apartment, of the city and county of Philadelphia.

THIS was a writ of habeas corpus, issued on the relation of Charles Lockington, an alien enemy, directed to John Smith, Esq. Marshal of the District of Pennsylvania, and Joseph Cornman, keeper of the debtor's apartment of the city and county of Philadelphia, commanding them to bring the body of the said Charles Lockington before the Court, and to return with the writ, the cause of his taking and detainer.

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The Marshal and Keeper filed separate returns.—The return of the Marshal was as follows :—

The Commonwealth of Pennsylvania, on the relation of Charles Lockington, an alien enemy.

vs.

John Smith, Esq. Marshal of the District of Pennsylvania, and Joseph Cornman, keeper of the debtor's apartment of the city and county of Philadelphia.

John Smith, Marshal of the District of Pennsylvania, to whom (as well as to the keeper of the debtor's apartment of the city and county of Philadelphia) the within writ of habeas corpus is directed, in obedience to the within writ, respectfully returns.

That he has here before the honourable the Justices of the Supreme Court of the State of Pennsylvania, at a Supreme Court, holden at Philadelphia, the body of Charles Lockington, in the debtor's apartment in the prison of the city and county of Philadelphia, in the custody of the said Marshal being, in manner hereinafter set forth, as in and by the writ he is commanded. And as to the day, and cause, and manner, of taking and detaining the said Charles Lockington, the said Marshal further respectfully returns: That on the eighteenth day of June, in the year one thousand eight hundred and twelve, an act of Congress was passed, declaring war between the United States of America and their territories, and the United Kingdom of Great-Britain and Ireland, and the dependencies thereof; and that on the nineteenth day of the same month, the President of the United States made proclamation of the event.

That after the said declaration of war and proclamation, the President of the United States, in the due exercise of the authority in him vested, by an act of Congress, entitled "an act respecting alien enemies," by his public acts directed the conduct to be observed, on the part of the United States, towards all natives, citizens, denizens, and subjects, of the King of the said

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United Kingdom of Great-Britain and Ireland, being males of the age of fourteen years and upwards, who were within the United States, and not actually naturalized, and who had become liable, by force of the said act of Congress, to be apprehended, restrained, secured, and removed, as alien enemies; the manner and degree of the restraint to which they should be subject; and in what cases, and upon what security, their residence should be permitted: And did establish other regulations, which were found necessary in the premises, and for the public safety.

That, more especially, among other things, the President of the United States, in the due exercise of his authority aforesaid, did, by his public act, issued from the Department of State, on the twenty-third day of February, in the year 1813, and by the regulations and orders which he established, as necessary in the premises, and for the public safety, to carry his said public act into effect, direct and require, that "alien enemies, residing or being, within forty miles of tide water, should forthwith apply to the Marshals of the States, or Territories in which they respectively are, for passports to retire to such places, beyond that distance from tide water, as should be designated by the Marshals. This regulation, however, is not to be put in force, without special notice, against such alien enemies, not engaged in commerce, as were settled, previously to the declaration of war, in their present abode, or are there, pursuing some regular and lawful occupation, unconnected with commerce, and who obtain, monthly, from the Marshal of the District, in which they reside, permission to remain where they are." And, that "all those to whom the said recited public act has reference, engaged in commerce, who do not immediately conform to the requisition, should be taken into custody, and conveyed to the places assigned to them." And, that "in the case of an alien enemy, who should so far abuse the indulgence and hospitality of the country, in time of war with his nation, as to declare his adherence to the enemy, and disposition to support their interest; or who should attempt to distrust the confidence reposed in their go-

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vernment, by the citizens of the United States; the marshal should (first taking care to establish the fact) place him immediately in close confinement." And that the marshal "should offer, for execution, to every alien enemy, within his district, who has been, or might be, removed from the vicinity of tide water, a certain parole of honor; and if refused, should place every person so refusing, without distinction, forthwith in close confinement." And "that no person, who should be imprisoned, under the order respecting the said parole of honour, should be liberated, and admitted to parole, but by special order from the office of the commissary-general of prisoners of war, including the superintendancy of alien enemies."

That before, and at the time of the making of the said declaration of war and proclamation, Charles Lockington, the prisoner now before the honorable court, was a subject of the king of the said united kingdom of Great Britain and Ireland, of the age of twenty years and upwards, residing within the United States, to wit, in the city of Philadelphia, in the district of Pennsylvania, within forty miles of tide water, engaged in, and connected with commerce, and was not, at the time of the said declaration and proclamation, nor has he been at any time since, actually naturalized.

That, on the eighteenth day of July, in the year 1812, the said Charles Lockington reported himself to the said marshal of the district of Pennsylvania, as an alien and British subject; and that on the thirteenth day of March, 1813, the said Charles Lockington applied, as an alien enemy, to the said marshal, for a passport to retire to Lancaster, which, upon the application and request of the said Charles Lockington, was, afterwards, changed to Reading, in the said district of Pennsylvania, a place beyond forty miles from tide-water, designated by the said marshal for the place of the said Charles Lockington's retirement, in pursuance of the said public act of the president of the United States, issued from the department of state, on the said twenty-third day of February, in the year 1813, as aforesaid.

That after the said marshal's designation of Reading,

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as the place of the retirement of the said Charles Lockington as aforesaid, to wit, on the ninth day of November, in the year 1813, the said marshal found the said Charles Lockington, in the city of Philadelphia aforesaid, contrary to the form of the said public acts, regulations and orders, of the president of the United States in such case made and provided and established as aforesaid; and thereupon directed and required the said Charles Lockington, to retire to Reading aforesaid, the place designated by the said marshal for his retirement as aforesaid, which the said Charles Lockington refused to do: by reason whereof the said marshal, acting under the authority of the constitution and laws of the United States, and the public acts, regulations and orders of the President of the United States, in such case made provided and established as aforesaid, took the said Charles Lockington into his custody.

That the state of Pennsylvania, in compliance with the request of Congress, has accommodated the United States with the use of her prisons, for the safe keeping of persons, arrested under their authority; and that the debtor's apartment, in the prison of the city and county of Philadelphia, (one of the prisons of the said state of Pennsylvania) is a convenient, usual, and lawful, place of confinement, for persons taken into custody, by the marshal of the district of Pennsylvania, under the authority of the United States.

That the said marshal, having taken the said Charles Lockington into his custody as aforesaid, under the authority, and for the cause aforesaid, placed him for safe keeping in the said debtor's apartment of the prison of the city and county of Philadelphia, until he could be conveyed, or would voluntarily consent to retire to Reading aforesaid, or should be otherwise discharged according to law. And thereupon the said marshal, delivered to the keepor of the said debtor's apartment, an instrument in writing, as a voucher to show, that the said Charles Lockington was placed in the said debtor's apartment to be safely kept, as the prisoner of the said marshal, taken into his custody, under the authority, and for the cause aforesaid: a true copy of which instrument is hereunto annexed.

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That after the said Charles Lockington was taken into custody, and imprisoned, as aforesaid, to wit, on the twelfth day of November, in the year 1813, he sued forth a writ of habeas corpus, directed to the keeper of the said debtor's apartment of the city and county of Philadelphia, and returnable immediately, before the honorable William Tilghman, the Chief Justice of this honorable Court now present, in the Court-room of the Supreme Court, to be heard and considered at ten o'clock, on the morning of the thirteenth of November, 1813. And the said writ of habeas corpus being duly returned, the said Chief Justice proceeded to examine into the facts relating to the case, and into the cause of the confinement, or restraint, of the said Charles Lockington as aforesaid; and did thereupon order the said Charles Lockington to be remanded, into the custody of the said keeper of the said debtor's apartment, as to justice appertained.

That after the said Chief Justice had examined into the facts of the case, and into the cause of the confinement, or restraint, of the said Charles Lockington as aforesaid, and had remanded the said Charles Lockington into custody as aforesaid, the said Charles Lockington instituted an action of tresspass and false imprisonment against the said marshal, in the Circuit Court of the United States for the district of Pennsylvania.

That the said writ of habeas corpus, allowed and decided by the said Chief Justice, and the said action of tresspass and false imprisonment and the present writ of habeas corpus, depending before this honorable Court, were, and are, proceedings founded upon the same transaction (and not upon several and distinct transactions) in which the said marshal has acted as aforesaid, under the authority of the constitution and laws of the United States, and the said public acts, regulations and orders of the President of the United States, in such case made and provided, and established, as aforesaid.

And the said marshal, as further cause for his detaining in his custody as aforesaid, the said Charles Lockington, respectfully returns, that on the day of

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November, in the year 1813, he offered for execution to the said Charles Lockington, being an alien enemy, who had been removed from the vicinity of tide-water, as aforesaid, the said parole of honor, which by the said public acts, regulations, and orders, of the President of the United States, every such alien enemy was required to execute; but the said Charles Lockington refused to execute the said parole of honor: whereupon, and by virtue of the said public acts, regulations, and orders, of the President of the United States, he became liable to be taken, and detained, in the custody of the said marshal; and is for that cause, also, now actually detained in the custody of the said marshal, in the manner aforesaid.

And the said marshal, as further cause for detaining in his custody as aforesaid, the said Charles Lockington, respectfully returns: That the said Charles Lockington, being an alien enemy as aforesaid, has, on various occasions, since the said declaration of war and proclamation were made, grossly abused the indulgence and hospitality of the United States towards alien enemies, by declaring his adherence to the enemy, and his disposition to support their interest; and by aspersing the character and conduct of the government and people of the United States, contrary to the form of the public acts regulations and orders of the President of the United States, in such case made provided and established. And the said marshal (having taken care to establish the fact of such abuse, by the written representation of credible persons) for that cause, also, now actually detains the said Charles Lockington in his custody, in the manner aforesaid.

And the said marshal, as further cause for taking into his custody and detaining the said Charles Lockington, respectfully returns, that when the said Charles Lockington, an alien enemy, as aforesaid, was taken into his custody as aforesaid, the said Charles Lockington was resident and at large within the district of Pennsylvania, to the danger of the public peace and safety (as the said marshal was informed and believes) and contrary to the tenor and intent of the said public acts, regulations and orders of the President of the

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United States in such case made, provided, and established as aforesaid. And the said marshal, for that cause, also, now actually detains the said Charles Lockington in his custody, in the manner aforesaid.

And the said John Smith, marshal as aforesaid, returns, that on the day aforesaid, for the causes aforesaid, he took the said Charles Lockington, being an alien enemy, concerned in and connected with commerce, as aforesaid, into his custody as aforesaid, and that he detains the said Charles Lockington in his custody, in the manner aforesaid, under the authority aforesaid, for the causes and purposes aforesaid, of which due communication has been made to the President of the United States.

JOHN SMITH,
Marshal of the District of Pennsylvania.

Sworn and subscribed, in open Court,
Dec. 21, 1813.
JOSEPH BARNES, Prot.

United States,
Pennsylvania District. } ss.

Charles Lockington, an alien enemy, having violated the rules prescribed for his government, you are, therefore, charged to receive his body, and him safely keep, until discharged by law.

Given under my hand and seal, this 9th day of November, 1813.

JOHN SMITH, *Marshal.*

To the keeper of the debtor's apartment.

The return of the Keeper was as follows:

Joseph Cornman, keeper of the debtors' apartment of the prison of the city and county of Philadelphia, to whom (as well as to John Smith, marshal of the district of Pennsylvania) the within writ of habeas corpus is directed, in obedience to the within writ, respectfully returns:

That the state of Pennsylvania in compliance with the request of congress, has accommodated the United States with the use of her prisons, for the safe keeping

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of persons arrested under their authority; and that the debtors' apartment of the prison of the city and county of Philadelphia, of which the said Joseph Cornman is keeper as aforesaid (being one of the prisons of the said state of Pennsylvania) is a convenient, usual, and lawful place of confinement, for persons taken into custody, by the marshal of the district of Pennsylvania, under the authority of the United States.

That John Smith, esq. the marshal of the said district of Pennsylvania, having taken into his custody Charles Lockington, an alien enemy, the prisoner now before this honourable court, under the authority, and for the causes, in the return of the said marshal, to the present writ of habeas corpus particularly set forth, placed the said Charles Lockington in the said debtor's apartment of the city and county of Philadelphia for safe keeping; and thereupon delivered to the said Joseph Cornman, as keeper of the said debtors' apartment, an instrument in writing, as a voucher to show, that the said Charles Lockington was placed in the said debtor's apartment, for a violation of the rules prescribed for the government of alien enemies, to be there safely kept, as prisoner of the said marshal until removed, or released, by the said marshal, or otherwise discharged by law, of which instrument the original is now here exhibited to this honourable court.

That after the said Charles Lockington had been placed by the said marshal in the debtor's apartment of the said prison of the city and county of Philadelphia, for safe keeping as aforesaid, to wit, on the twelfth day of November last past, the said Charles Lockington sued forth a writ of habeas corpus directed to the said Joseph Cornman, keeper of the said debtors' apartment as aforesaid, and returnable immediately before the honourable William Tilghman, the chief justice of this honorable court now present, in the court room of the Supreme court, to be heard and considered, at ten o'clock on the morning of the thirteenth day of the said month of November last past. And the said writ of habeas corpus being duly returned, the said Chief Justice proceeded to examine into the facts re-

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lating to the case, and into the cause and confinement, or restraint, of the said Charles Lockington as aforesaid; and did, thereupon, order the said Charles Lockington to be remanded into the custody of the said Joseph Cornman, keeper of the said debtors' apartment as aforesaid, as to justice appertained.

And the said Joseph Cornman, keeper of the Debtors' apartment of the said prison of the city and county of Philadelphia as aforesaid, respectfully returns, that the said Charles Lockington, an alien enemy, was placed by the said marshal of the district of Pennsylvania, under the authority aforesaid, for the cause and purpose aforesaid, in the said Debtors' apartment to be there safely kept, as the prisoner of the said marshal, until he should be removed, or released, by the said marshal, or should be otherwise discharged by law: and that the said Joseph Cornman, keeper of the said Debtors' apartment as aforesaid, received the said Charles Lockington, an alien enemy as aforesaid, as the prisoner of the said marshal, in performance of his duty as keeper of the said Debtors' apartment, to receive and safely keep persons, taken into the custody of the said marshal, under the authority of the United States. And that the said Joseph Cornman, keeper of the said Debtors' apartment, detains the said Charles Lockington, an alien enemy as aforesaid, as the prisoner of the said marshal, as well by reason of the said Charles Lockingtons' being placed by the said marshal in the Debtors' apartment, for safe keeping under the authority and for the cause and purpose aforesaid, as by reason of the said order, of the said Chief Justice, remanding the said Charles Lockington into his custody as aforesaid.

JOSEPH CORNMAN, *Keeper.*

Lockington was a British subject. He arrived in the United States before the declaration of war, and was employed as a clerk in a merchants' counting-house in Philadelphia. On the 18th of July, 1812; he reported himself to the marshal as a British subject, conformably to the notice issued from the Department of State on the 7th of July, 1812. On the 13th of March,

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1813, he obtained the marshals' passport to retire to Lancaster, agreeably to the notice from the Department of State of the 23d February, 1813. He afterwards requested and obtained permission to leave Lancaster, and retire to Reading. He remained, however, at Lancaster, until his pecuniary means of support failed him, when he returned to Philadelphia, some time in the early part of November. Shortly after he returned, he was required by the marshal to retire to Reading, which he refused to do unless his expenses were paid. The marshal thereupon took him into custody as an alien enemy on a charge of having violated the rules prescribed for the government of those persons and delivered him to the keeper of the debtors' apartment with directions to detain him until he could be conveyed, or would consent to retire, to Reading, or should be otherwise discharged by law.

In consequence of this proceeding, Lockington, on the 12th November, sued out a habeas corpus to the keeper, returnable before the Chief Justice. At the hearing before the Chief Justice, the marshal exhibited a suggestion excepting to his jurisdiction; offering, however, at the same time to release Lockington from prison, on condition that he would immediately retire to Reading. To these terms Lockington refused to accede.

The case was argued before his honour by Mr. Hare, in behalf of Lockington, and by Mr. Dallas, for the marshal.

The Chief Justice held the case under advisement for several days; when, after delivering an elaborate opinion embracing the question of state jurisdiction, as well as the merits of the application, he ordered Lockington to be remanded. At the hearing before his honor the Chief Justice, the parole of honor, prescribed by the president, was tendered to Lockington, who declined accepting it; but he stated that if permission was granted him, he would leave the United States.

During his imprisonment, Lockington applied to the marshal for subsistence. The marshal directed the keeper to furnish him with the debtor's allowance,

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which he also refused to accept. He was supported by the liberality of his friends. Before the return of the present writ, Mr. Hare, on behalf of Lockington, exhibited a petition, signed by Lockington, praying the Court to take cognizance of his case under the 2d sect. of the Act of Congress respecting alien enemies.*

* The petition was in the following words:

To the honourable *William Tilghman*, esquire, Chief Justice of the *Supreme Court* of *Pennsylvania*, and his associates, *Jasper Yates*, and *H. H. Brackenridge*, esquires, Justices of the same *Court*.

The petition of Charles Lockington, humbly sheweth,

THAT your petitioner is a native of England, educated to a mercantile pursuit, and not fitted either by constitution or by habit, for manual labour. That some time before the declaration of war between the United States, and Great Britain, he came to this country on the faith of the constitutional and legislative encouragements which are offered to foreigners who may be inclined to settle and reside here; and under the full belief and assurance, that he would be protected according to the forms and principles of the American Constitution, in the enjoyment of his property, liberty, and personal security. That soon after his arrival, he sought for, and obtained employment in the house of a respectable merchant of this city, and has never since committed, nor, to his knowledge, been suspected or accused of committing any offence against the government or laws. That after the declaration of war, your petitioner duly reported himself as a British alien, conformably to the notice from the marshal published in the Newspapers, and at a subsequent period, in obedience to an order from the marshal, retired to Lancaster, an inland town, where it is difficult or impossible to procure employment in any vocation for which he is fitted. That he remained at Lancaster until his funds were exhausted, and being destitute of the means of support, he was compelled to return to Philadelphia, in order to obtain the means of subsistence.

That soon after his return to Philadelphia, the marshal ordered him to retire to Reading, also an inland town, where little or no commercial business is done, and where of consequence it would be no less difficult to obtain employment than in Lancaster. That upon receiving this order, he represented his pecuniary inability to the marshal, stated his desire to be permitted to depart from the United States, or if this should be denied him, his willingness to retire to Reading, if the means of doing so, and of supporting him when there were furnished him. That the marshal instead of yielding to these reasonable representations, has committed your petitioner to the gaol of the city and county of Philadelphia, where he has been confined since the ninth of November last, without oath, without crime or accusation, without process of law, or previous examination by any judicial officer, without trial, and without any means of liberation, other than such as may be now afforded by your honors, or as may be dependant on the will of the marshal.

That during his confinement he made repeated applications to the marshal for subsistence, to which no answer has been returned, and that in fact, as he has been hitherto only supported by the humanity of his brother prisoners, and small loans or donations, from a gentleman of this city, and he knows not, should further aid from these sources be withdrawn, and his imprisonment be long protracted, to what extremities he may be reduced. That your petitioner is advised, that by the laws and usages of all civilized nations, aliens are entitled, upon a declaration of war with their sovereign, to depart for their own country, unless perhaps under circumstances of criminal misconduct specially charged to the individual whom it may be intended to restrain from departing; and that by the constitution and laws of this

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The merits of this application were discussed during the argument on the present habeas corpus.

The case was elaborately argued, during several days, by Messrs. Hare and Condy, for the petitioner and by Mr. Dallas for the marshal.

The following are the opinions of the judges delivered on the first of January, 1814.

TILGHMAN, Chief Justice. Having on a very late occasion, delivered my opinion, on the authority of this Court to issue writs of habeas corpus, and also on the authority of the president of the United States, and the regulations established by him by virtue of the "Act respecting alien enemies," I have, at present, only to refer to that opinion,* and to say, that it remains unaltered. But, Mr. Lockington has brought his case before us, in another print of view, on which it is necessary to decide. He has petitioned this court to order him to be removed out of the United States, or to permit him to go, of his own accord. I am clear in the opinion that no part of this petition can be granted. This Court has no power with respect to the removal of alien enemies, except that which is derived from the Act of Congress. And that act authorizes us to proceed, only "upon complaint against an alien enemy, who is resident and at large within this state, to the danger of the public peace or safety, and contrary to the tenor or intent of the proclamation or regulations established by the President of the United States." But

country, your petitioner having been domiciled here previous to the war, is not a Prisoner of War, nor liable as such to the military authority of the President, but is entitled to be protected, and liable to be punished in the ordinary course of justice, subject only to a power in the government to order and compel his departure out of the United States, and to prescribe the conditions upon which his residence therein shall be permitted. Your petitioner, therefore, humbly prays your honorable Court to take his case into consideration, and under the second section of the Act of Congress concerning Alien enemies, or otherwise, to make an order either for the absolute discharge of your petitioner from imprisonment, or that he shall be removed out of the United States. After which your petitioner engages to leave the United States as soon as possible.

(Signed.) CHARLES LOCKINGTON.

Charles Lockington, the petitioner within named, being duly sworn, deposeth and saith, that the facts stated in the within petition are true

Sworn and subscribed in open Court, (Signed)
21 *Dec.* 1813. CHARLES LOCKINGTON.
JOS. BARNES.

* Vide ante, p. 92.

no complaint has been preferred against Mr. Lockington. He has caused himself to be brought before us by a habeas corpus in order to decide on the legality of his imprisonment, and although, in the return to the writ, some facts are stated which might afford ground for complaint, yet that return is by no means to be taken as the exhibition of a complaint, but merely as the setting forth of the causes for which the prisoner is held in confinement. But even if we had jurisdiction, I should be equally clear that the petition ought not to be granted, because, the President of the United States having established certain regulations, within the sphere of his authority, by virtue of which, Mr. Lockington is to be held in restraint, *within the United States;* we have no power to contravene those regulations, by ordering him to be removed out of the United States, or by permitting him to go of his own accord.

YATES. J. The argument on this habeas corpus has been conducted with singular ability and depth of research.

A preliminary question has been raised by the district attorney of the United States, that as a state Court we have no jurisdiction of the case before us. Upon this point, I feel no doubt or difficulty whatever.

It is candidly admitted, that in all cases where a person is restrained of his personal liberty, and the Court or Judge have the slightest doubt of the legality thereof, they, ought upon a proper application made to them, to award a writ of habeas corpus. Here Charles Lockington has been deprived of his liberty, and is in actual confinement in the debtor's apartment of Philadelphia. He complains of his imprisonment as illegal, and demands a hearing. This Court, and each member of it in vacation, have authority to allow a writ of habeas corpus, as well at common law, as under the express terms of our act of Assembly, of the 18th February, 1785, which directs, "that where any person not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his liberty, under any colour or pretence whate-

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ver," he shall have such writ. Admitting in its fullest extent the judicial power of the United States to extend to all cases in law or equity arising under the constitution, the laws of the United States, and the treaties made under their authority, it does not follow, that the jurisdiction of the state Courts in such instances is abolished. They are necessarily called upon to determine, in many cases, the true construction of the constitution, the laws of the United States, and treaties made under their authority. But the ultimate decision in these instances is secured by law to the Supreme Court of the United States. It is declared by an amendment to the constitution of the United States, that the powers not delegated thereby to the United States, nor prohibited by it to the States, are reserved to the states respectively, or to the people.—No act of the general government has attempted to take away the right of the state Courts in the particular under consideration; and it is of the utmost importance to the citizens and other inhabitants of every state in the Union, that a speedy hearing should be secured to them in all cases of restraint of their personal freedom. The true interests of the individual sovereignties composing the Union, and, in truth, of the Union itself, are inseparably connected with the independence of the judicial tribunals of the several states. Imperious duty enjoins on the state Courts, not to surrender up their right of issuing writs of habeas corpus, unless on the clearest conviction that they have no just claim thereto.

The return by John Smith, the marshal, to this writ is of a very special nature. It states the act of Congress declaring war against Great-Britain, the President's proclamation, the President's directions of the conduct to be observed by the United States towards alien enemies, and more especially that of the 23d February, 1813, setting them out, that Charles Lockington reported himself to the marshal as an alien and British subject, and applied for a passport to retire to Lancaster, which was afterwards changed to Reading, at his request: and that after the marshal's designation of Reading, he found Lockington in Phi-

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ladelphia, and directed and required him to repair to Reading, which he refused to do, and thereupon he took him into custody, and placed him for safe keeping in the debtor's apartment, until he could be conveyed, or would voluntarily go, to Reading, or should be otherwise discharged according to law; that Lockington sued out a habeas corpus returnable before the Chief Justice, and was remanded upon a hearing, and afterwards brought an action of tresspass and false imprisonment against the marshal, but refused to execute a parole of honor which was tendered to him; that Lockington had, on several occasions, since the President's proclamation, grossly abused the indulgence and hospitality of the United States, by declaring his adherence to the enemy, and his disposition to support their interest, and by aspersing the character and conduct of the government and people of the United States; and that when Lockington was taken into custody he was resident and at large within the district of Pennsylvania, to the danger of the public peace and safety, &c.

The question before us, is, whether a legal and sufficient cause for the imprisonment of Charles Lockington has been shown to the Court.

The contest arises on the words of the act of Congress, passed the 6th July, 1798, "respecting alien enemies."

The first section thereof provides, that "in the event of a war or invasion, and the President of the United States shall have made public proclamation thereof, all natives, citizens, denizens, or subjects to the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be *apprehended, restrained, secured* and *removed*, as alien enemies. And the President of the United States shall be, and he is hereby authorized in any event, as aforesaid, by his proclamation thereof, or *other public act*, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject,

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and in what cases, and upon what security, their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises, and *for the public safety*," &c.

Here it is objected, that although war has been declared against Great Britain, and the same has been proclaimed by the President of the United States, yet he has neither by his *proclamation*, or *other public act*, given the directions, or established the regulations required by the law; and that such directions and regulations being in the nature of public laws respecting the conduct of alien enemies in general, ought to have been solemnly authenticated under the national great seal. That the notification made on this occasion produced the effect designed thereby, is ascertained by the fact, that the British alien enemies resident among us actually reported themselves to the marshal. If the act has been done in the usual and accustomed manner in which the communications of the President of the United States have been made in other cases, wherein such duty has been enjoined on him, it would appear to me to be a sufficient *public act* within the meaning of the law. These public acts issued from the department of state, founded on the President's instructions, and were made known through the medium of the same newspapers in which the laws of the Union were promulgated. We find that the President was authorized to establish regulations under the embargo laws of 1794 and 1807: and the communication thereof was made by the Secretary of the Treasury. So also where the President was impowered to borrow money on loan. In like manner where the authority was given to him to extinguish the lights on the sea coast; and so in other instances, which were cited on the argument. To civil commissions, the great seal is necessary by the law of the 15th December, 1789; but it is not to be affixed to other papers unless directed by the President of the United States. Proclamations are not always under the great seal.—

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Added to the different letters from the Secretary of the Department of State, under his own signature, to the marshal, containing his official instructions, several letters have been produced from John Mason, Esq. commissary-general of prisoners, *including the superintendency of alien enemies*, a known officer in the execution of his duty, which refer to the publications of the department of state, as founded upon the immediate act of the President of the United States. On this point, therefore, I am of opinion, that the President, *by a public act*, has given the directions, and established the regulations, enjoined on him by the law of July, 1798

But the great difficulty of the case remains still to be considered. Was the imprisonment of Charles Lockington by the mere act of the marshal alone, under his instructions, *legal*, without calling in the aid of the judicial authority? It is a question of great moment, inasmuch as it deeply interests the national welfare, and all that class of alien enemies, which falls within the President's regulations, and therefore demands the fullest investigation.

I will assert at once, that I consider C. L. although an alien enemy when the war was declared, yet, as resident amongst us at that period, entitled to certain rights, until he has forfeited them by some offence cognizable by the laws of war. I do not view him as a prisoner of war, subdued and forcibly brought into the United States. And it is observable, that under the letter of the 15th April, 1813, from the secretary of state to the marshal, that the *superintendency of alien enemies* is annexed to Mr. Mason's character as *commissary-general of prisoners*, so that they are distinct offices, though united in one person.

I regard the true meaning of the law of the 6th of July, 1798, to be collected *ex visceribus suis*, as the only correct ground of decision thereon. It is of no moment, in my idea, how it was treated by different gentlemen on the floor of Congress, or to what political party they belonged. It has passed into a *law* in the form in which we find it in the statute book. As such, we are compelled by every tie of duty to execute it,

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even although we should suppose it to infringe, in some instances, the antient or modern codes of the law of nations.

The great prominent feature which is exhibited to our view in every part of this law, is, that its provisions were made for *the public safety;* and although "the dictates of humanity and national hospitality" were not unattended to, their extent was limited to the *salus populi.*

The first section I have already recited. The President of the United States was thereby impowered to establish *any* regulations which should be found necessary for the public safety. Persons of a certain description were liable to be *apprehended, restrained, secured* and *removed,* as alien enemies, under the President's directions. Their residence therefore might be *restrained* to certain distances from the tide-water, according to the President's idea of probable impending danger to the community at large. The means of effectuating the primary object of *ne quid detrimenti capiat respublica,* must necessarily be supposed to be given; and if the alien refused or neglected to repair to the place of residence appointed by the marshal under the President's directions, the marshal might secure and remove him. The terms of this section taken by themselves, and independently of the succeeding section, would warrant a confinement by the marshal, for the purposes of removal.

The words of the second section are contended to have restrained the general import of the preceding clause. It is thus expressed: "After any proclama-"tion shall be made as aforesaid, it shall be the duty "of the several Courts of the United States, and of "each state, having criminal jurisdiction, and of the "several judges and justices of the Courts of the "United States, and they shall be, and are hereby re-"spectively, authorized upon complaint, against any "alien or alien enemies, as aforesaid, who shall be "resident and at large within such jurisdiction or dis-"trict, to the danger of the public peace or safety, "and contrary to the tenor or intent of such proclama-"tion, or other regulations which the President of the

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"United States shall and may establish in the premi-
"ses, to cause such alien or aliens to be duly appre-
"hended and convened before such court, judge or
"justice; and after a full examination and hearing on
"such complaint, and sufficient cause therefor appear-
"ing, shall and may order such alien or aliens, to be
"removed out of the territory of the United States, or
"to give sureties of their good behaviour, or to be
"otherwise restrained, conformably to the proclama-
"tion or regulations which shall and may be establish-
"ed as aforesaid, and may imprison, or otherwise se-
"cure such alien or aliens, until the order which shall
"and may be made, as aforesaid, shall be performed."

It is urged, that a marked line has prescribed the manner in which the regulations of the President should be effectuated, and that the powers granted to the Courts, judges and justices are fully competent to carry the President's directions into complete execution. It is asked, shall the marshal execute instructions in the nature of a general warrant, without revision or control? And what ground of jealousy can be entertained against Courts and judges, who openly administer the justice of the country according to known rules? The dangers to be apprehended from the conduct of ministerial officers in executing such general directions, have been depicted in vivid and glowing colours.

When the vessel of the commonwealth is in danger, partial evils must be submitted to, in order to guard against a general wreck. Aliens who have come among us before a declaration of war against their sovereign, and continue to reside among us after it, cannot expect an exemption from such evils. Should our country be invaded, or our coasts blockaded, common prudence suggests that such persons should be removed from the scene of action. They may be safely detained, without subjecting them to unreasonable hardships, until it can be ascertained what course of conduct will be observed by the hostile country towards our own citizens resident there. The "laws' delay" would ill suit removals in cases of sudden emergency. To suppose that alien enemies might be wantonly

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sent to the head waters of the Missouri, or an uncultivated wilderness, by the President of the United States, or by the marshals of the federal Courts, is to put extreme cases, which no reasonable man will presume. But the President, and every executive officer of the Union, are responsible for the abuse of their authority; and, I may confidently assert, from my experience in life, that in this government at least, where a public officer has been guilty of oppression in office, he never has escaped with impunity, when an appeal has been made to the justice of the country.

The reason of introducing the third section into this law, appears to me to be by way of aid to the general measures of the government, and that the judicial authority is made auxiliary to the executive. It extends only to alien enemies who shall be resident and at large to the danger of the public peace and safety, and contrary to the tenor of the President's regulations. Such persons may be apprehended by the orders of the several Courts of the United States, and of each state having criminal jurisdiction, and be dealt with conformably to such regulations. The aid of the judicial authority will always be found of great moment to the marshal in the execution of his official duties.—It conduces to the public security, that such suspected person may be convened before a state Court, as well as the several Courts, judges and justices, of the United States, to answer the complaint made against him by the marshal, his deputies, or any individual. It would be deemed oppressive in the highest degree, if the party accused was to be brought before the district judge of the United States, in this city, to answer a complaint made against him in the extreme parts of the state. The witnesses in support of the prosecution would also be thereby subjected to great difficulties.

I, therefore, consider the true construction of the act in question to be, that the marshal may legally enforce the directions of the President, communicated by the proper departments, without being under the necessity of recurring to the judicial authority for that purpose. By section three, he may remove an alien out of the territory of the United States under the warrant of the

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President; and under his regulations he may be removed to a place in the interior, where less danger may be apprehended from him. It is not left to us to decide on the expedience of such a power being vested in the marshal, or avert the dangers which may result therefrom to the personal liberty of individuals. The law is bottomed on the great principles of self defence and self preservation; and if mischiefs arise therefrom, the legislature of the Union are alone competent to apply a remedy.

The question before us, is not whether, if Mr. Lockington had, in the first instance, elected to leave the territory of the United States, he would not have been entitled thereto, unless he had been charged with actual hostility, or other crime against the public safety, or some strong and cogent reason could be shown to the contrary; it is, whether, after having reported himself as an alien enemy under the regulations of the President, and his place of residence changed at his own request from Lancaster to Reading, he is not liable to be confined until his removal to the place of designation can be effected? I am of opinion, that the imprisonment of his person by the marshal on the ground of his refusal to go to Reading, was justifiable under the Act of Congress, and that we cannot relieve him from his confinement. His want of pecuniary means to remove himself to Reading, may excite our sympathy, but cannot change our decision.

I concur that he be remanded to the debtors' apartment.

Brackenridge, Justice. I will acknowledge, that it is not an easy matter, to say, what construction shall be put upon this Act of Congress, entitled, "an Act respecting *Alien enemies*:" whether, the executive of the general government, shall be confined, to the *ascertaining*, and *declaring*, such reasonable time, for *the departure* of this description of persons, from the United States, "as may be consistent" with the public safety: and according to the dictates of humanity, and national hospitality," no treaty having existed stipulating for a certain period: and, whether after having ascertained,

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and declared such reasonable time, the executive of the general government was authorised *merely* "to direct the conduct to be observed on the part of the United States," towards this description of persons who should remain in the country after such time; and that it shall lie with the judicial power to apply such *directions* to the particular case.

It cannot but have some weight, in a dubious case, to see what has been the construction put upon this act by the executive of the general government who has been entrusted, at least to some extent, with the carrying this act into effect. The construction the executive of the general government has put upon it, is discoverable from the manner in which it has acted upon it, and the measures adopted in carrying it into effect. But considerations of policy, in the construction of an act must at all times have weight.

Will it be contended that the judicial power is the only *medium* through which an *alien enemy* can be apprehended, &c. and this *on complaint made?* In that case it being left to the interference of individuals, little would be done: It is odious *to inform*, and unless imposed as *official duty*, who would like to do it? It would be too much to expect from the *mere impulse of patriotism* such exertions for the public safety? Would it not seem too *narrow a construction* of the Act of Congress, and tending to defeat the object of the law? If so, I would consider the *judicial power* as *auxiliary only* to the authority of the executive of the general government, and no more. The auxiliary aid of the *judicial power*, is *consistent* with the *executive power* of the general government, in apprehending, &c. But the authority of the *judicial power* to judge of what the executive of the general government have done in the exercise of their authority *according to the Law of Nations*, or, under the Act of Congress, is *inconsistent* with the right of the executive to judge in the last resort, or to act *in the first instance*. *Every* Court of every state competent to issue a habeas corpus may impede the acts of the executive of the general government, in the exercise of its power.

Quo capitum totidem stadiorum millia.

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A thousand inner wheels will counteract the outer, and the machine will stop. The interior gyrations will not correspond with the exterior in a geometrical problem; or, as we say, in mathematical science, the interior circles will not be parallel with the exterior. No machine can be constructed that would move on such a principle. For the Supreme Court of the United States can have no control over the concurrent acts of the several courts by way of appeal in this case. May it not therefore be inferred that it could not have been intended under the act of Congress to give the *judicial power*, either of the Courts of the United States, or of the State Courts, more than an auxiliary jurisdiction?

Hence the question in this case will be, can the judicial power do more than what is *auxiliary*, and interfere on behalf of an *alien enemy*, to take him out of the custody of the executive of the general government, on the ground of being "apprehended, restrained, secured, or removed," unreasonably, and without just cause, or *oppressively* in the particular case? I consider alien enemies so apprehended, &c. as coming under the denomination of *prisoners of state*, not for any offence against the state, but for *reasons of state*, it being necessary *for the safety of the state* that they should be so apprehended, &c. Having not been taken in battle, I cannot call them *prisoners of war*, for they are not liable to be *exchanged*. But what else can they be considered, when apprehended, but as *prisoners* to some extent? By this act, entitled, "An act respecting alien enemies," the President would seem to be constituted as to this description of persons, with the power of a Roman dictator, or consul in extraordinary cases, when the Republic was in danger, that it sustain no damage: ne quid detrimenti respublica capiat. Are we not excluded in such case by our habeas corpus act, and by the constitution of the United States, that we shall not interfere? By our habeas corpus act which is the same with that of the constitution of the United States, Art. 4. Sec. 2. "A person charged with a breach or violation of the law of nations," is not the subject of a habeas corpus. Alien enemies remaining in our country after a declaration of war, are to be treated accord-

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ing to the law of nations, and it has been so argued in this case. Shall then the judicial power constitute itself a judge between the executive of the general government, and the nation with whom we are at war, and say, whether the proceeding in the case of their subjects remaining in our country, has been according to the law of nations!

There is the same reason that the municipal judiciary shall not interfere with the general executive, as where the individual is charged with a breach or violation of the law of nations. In a case of *alien enemy*, I do not therefore see how this state Court or the Court of the United States, can undertake to say whether the proceeding of the executive of the general government has been regular, or irregular; *according to the law of nations* in the case: or *according to the act* of Congress, of which it must be supposed they are the judges, and responsible only to the body politic of the union for the construction of their statute.

A report has been read from a Gazette, of a decision of a Court of the United States, Chief Justice Marshal, and judge Tucker, composing that Court, *great names*, and in high station. This report, if correct, carries with it evidence that the executive authority, was warranted in apprehending, &c. without the *intervention of the judicial power*. It carries with it evidence also that this Court did undertake to review, and set aside the acts of the *marshal at least*, under a habeas corpus, on behalf of one apprehended and restrained by him. This was on the ground of not *appointing a place to which the prisoner was to be removed*. The exercise of this power, would seem to imply, that it was competent to them to judge also of the locus in quem, or the place to which the alien enemy was to be removed. It might be an unwholesome fen, or DISMAL SWAMP, a barren mountain, an unpeopled country, a remote district, a Siberian Wilderness. Might not such consideration be extended also upon the same principle to the *nature of the society* to which the alien was to be removed, or the locus in quo as unsuitable for the employment of the alien in his *accustomed occupation* or art, so as *to be able to obtain the means of subsistence*, or

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otherwise. If such latitude could be taken by the Courts, what hindred to have reviewed the whole proceedings of the general government, ab initio, and to have begun at the bottom, or first act in relation to alien enemies? To have inquired as to the executive having given notice a *reasonable time* to alien enemies *to depart* from the country before it had proceeded to apprehend, &c.?

It is true, it is not enjoined, that the President *shall* give notice by proclamation or other *public act*, the word *may* being used; but was it not a sine qua non, an act without having done which, *a step could not be taken* in apprehending, &c. This would seem to be a reasonable construction, and that it was not until after such proclamation, or other *public act* announcing this, such description of persons remaining in the country after such limitation of time, were bound to consider themselves as liable to be apprehended, &c. Was I to take any ground in the case, it would be this; for I do not see any declaration, or public act of the government announcing such time after which alien enemies choosing to remain were to consider themselves as existing, that is, *remaining* in the country by the courtesy of the government, and subject to all the regulations, restrictions and directions which might be made by the government respecting them. But I do not see that the Courts of the United States have the power to interfere on any ground, on behalf of such description of persons. The courts of the United States have no more power than this has to inquire into the regularity of the proceedings on the part of the executive of the general government, with regard to this description of persons. The return of the marshal that he holds an applicant as an *alien enemy*, in other words, a British subject; for that is the only nation with whom we are war; and the admission by the applicant that he is of such description of persons; no traverse tendered as to his not being such, exclude, in my opinion, the interposition of this Court, or of any other Court. This redress against any undue procending of the executive, or of any officer acting under the appearance of that authority, must be *through the department of State, to the President himself.*

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I have no idea, that if the alien enemy had violated a municipal law, and had been arrested for that offence, and was in custody under process from any municipal Court, the President could interpose to take him out of custody, or to send him out of the country. For the alien enemy is not out of the law so far as to claim protection from the law against trespasses; or, so far as to be liable to prosecutions for trespasses done by him; but so far as to preclude interposition between him and the general government. I think he is to be considered as out of the municipal law, and not the subject of a habeas corpus in that case. We are *imperium in imperio*, and I do not think our judicial power extends to impede the march of the general government; but is confined to what *is auxiliary*, and cannot controul. It will be understood that I mean the case of a person in custody under the denomination of a British subject; and who admits himself, to be of that description of persons, and, to be in confinement as such. I do not see that any habeas corpus can issue, unless the applicant can make an affidavit in the first instance, that he is not an alien enemy; or, in other words, a British subject flagrante bello with that nation. It wholly belongs to the general government; and, on a representation to the executive, through the department of state, it cannot but be presumed by the *judicial power*, that in the case of any undue proceeding against an alien enemy, relief will be given. It would introduce *endless confusion, and embarrassment*, to say that the judicial power can at all interfere between the alien enemy and the general government, so as to take him out of their hands, on an allegation that he was treated with inhumanity or hardship. The only thing that is alleged, or can be alleged is, the not having given notice a reasonable time, *to depart*. I do not see that this step has been taken in the first instance, if it had, there could not a word more be said. This, however, will be a consideration with the executive, who is responsible to the nation for every thing that an alien enemy could claim.

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As to the taking up of this case on the score of a complaint made to the judicial power, so as to make any order, the alien enemy is not *at large* which is the term in the act of Congress; and it is only in such case that the judicial power is warranted in apprehending, &c. so as to make an order to remove. We have not the power, not even if the marshal was to half strangle, instead of half starve the prisoner.—For the marshal is the President, and what he does must be considered the act of the executive. At the same time I must remark, that we have no evidence of half starving, or of any other hard usage, but the contrary. It is on a *complaint against* him that the Court can interfere; not on a *complaint for him*. The marshal makes no complaint against him. He stands upon his bond, and says he has him in custody. Can we take him out? I think we cannot.

To sum up what has been said in a desultory manner, the first step which, it seems to me, it behoved the executive of the general government to have taken under the act of Congress in question, was the promulgation of the *reasonable time* for the departure of alien enemies, six months having been given by the act of Congress, of the 6th July, 1812, "within which *passports* for the safe transportation of any ship, or other property, belonging to British subjects, then within the limits of the United States," this might have been supposed to have been the limitation for the departure of *persons* also. But a distinction exists and was to be taken between *property* and *persons*. There ought in *strictness* to have been a proclamation, or some *public* act, limiting the time as to *these*, after which they should consider themselves as liable to be apprehended, &c. and this not appearing to have been done, doubtless on a representation to the President now through the department of state by any of those willing to remove, they will obtain permission to depart, so that there can be no necessity for the Courts to interpose if they had the power: but it is my opinion they have not. It is on *complaint* made, that the Courts are warranted to act, meaning, I take it, the same with *information* given, that any alien enemy, contrary to

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the tenor and intent of *such proclamation, or other regulations, which the President of the United States shall and may establish in the premises*, that the Courts *shall cause* such *alien or aliens to be duly apprehended and convened before such court*, &c. But in order to be effectual for the great mass of his operations for the exigencies of the public safety, the executive must be considered as having a right to act in the first instance. It is, on proof of *improper* and *suspicious conduct*, that the alien is to be informed upon, or *complained* against, to a Court or judge, and *sufficient cause appearing*, that measures may be taken by this functionary of administration. But the President is not confined to *examination* in the individual case, and *sufficient cause appearing*, in prevention of what may be done by aliens, the President may order off, or cause to be removed out of the country, or confined within it, and this simply on the ground of not having departed agreeably to proclamation, or removed agreeably to regulations. I state this, the necessity of giving the act this construction, as justifying the President by his marshals, acting independently of judicial functionaries, and not subordinate to them. And for this reason, I am confident in my opinion, that the privilege of the habeas corpus does not extend to an interference with the proceedings of the executive authority in such a case. Did I not think so, I would consider myself bound to liberate on the ground of the first step not having been taken, the giving notice. Where the *requisitus* is not shown, and this not matter of *form*, but matter of *substance* in any case, a judicial proceeding cannot be supported, but the plaintiff must be non suit. But it may be said, that the calling on alien enemies to report themselves to the marshal, was *notice*. But this was *forthwith*, and does not imply a time preceeding. But this is a matter the responsibility of which lies to the nation, and with foreign nations, and not with the judicial power under this act. At the same time, I must say that I cannot suppose any of those remaining in the country would have removed, had notice of reasonable time been given.—The President had taken it for granted that all had

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removed within the six months with their effects that chose to go, and it is matter of form only that is complained of in this case. But of that I do not deem it competent for a judge, or Court to determine. It must lie with the executive, and not the judicial power.

The prisoner was, accordingly, remanded.

TENNESSEE—COURT OF ERRORS AND APPEALS.

Nashville, August Term, 1813.

TALBOTT V. THE HEIRS OF BEDFORD.*

[In an action of covenant on a warranty in a deed of bargain and sale of land, brought by the heirs of the warrantee against the warrantor, in consequence of the ancestor having been evicted from a part of the lands, by an action of ejectment, brought by a third person, it is not necessary that the plaintiffs should prove that the warrantor had notice of the action.

If he had notice of the action, he is bound by it: but if he had no notice he may contest the verdict.

In such action, of warrantee against the warrantor, it is not necessary to set out the better title by which the tenant was evicted.

The right of action in this case descends to the heirs of the warrantee; but if the ancestor had brought suit in his life, his personal representatives would be entitled to the benefit of it.

In such action the measure of damages should be the value of the land at the execution of the deed, with interest and costs.]

THIS was an action of covenant founded on a warranty in a deed of bargain and sale, executed by the plaintiff to the ancestor of the defendants, in the following words: "And the said Talbott for himself, his "heirs, executors, &c. doth covenant and agree, to "and with the said Thomas Bedford, his heirs and assigns, to warrant and forever defend the said tract of "640 acres of land, so bargained and sold unto the "said Thomas Bedford, his heirs and assigns, not only "against himself, but against the claim or claims of "all and every person whatsoever, in any manner "claiming the same."

* From the manuscript communicated by Judge Overton.

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Upon this covenant four breaches have been assigned.

1st. That a certain John Donelson, in the lifetime of the ancestor, lawfully claiming title to 540 acres of said land, entered upon, and took possession thereof, and in his life time, instituted an action of ejectment against the said Bedford, upon the trial of which, a verdict and judgment was rendered in favor of Donelson.

2d. That the plaintiff in error did not defend the said tract, so as aforesaid warranted, for that the said Donelson, having a better adverse claim to 540 acres of said tract, hath kept the said Bedford, in his life time, and his heirs since his death, out of the use and possession thereof, and still keeps the plaintiffs out of the possession.

3d. Is an averment that at the time of the conveyance and warranty aforesaid, the plaintiff in error had not any legal title to said 540 acres of land.

4th. That Donelson having a better adverse claim to the said 540 acres, did, since the death of the executor, lawfully evict the defendants.

To the first three breaches, there is a demurrer and joinder; to the fourth, replication and issue. The court below overruled the demurrer; upon which a writ of inquiry was awarded; and to inquire of damages, as well as to try the issue, a jury was impannelled, who returned a verdict for the plaintiffs below, and defendants in this court.

On the trial, it appeared that the defendants, in order to ascertain the amount of damages, gave in evidence the value of the land at the time of eviction, and also at the time of the trial. This evidence was opposed by the plaintiff, who requested the court to instruct the jury that the measure of damages should be the value of the land at the time of the execution of the deed, with the interest thereon, and costs, but the court refused to give these instructions, upon which exception was taken, and the cause removed here by writ of error.

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*Overton, J. In the argument at the bar it has been insisted that Talbott had no notice to defend, or prosecute the actions referred to in the breaches, and therefore ought not to be affected by the verdicts and judgments in those actions.

2d. The declaration does not state the better title, nor the particulars of it, by which the eviction took place.

3d. That the breaches took place in the life time of the ancestors, whereby the right of action accrued to the executors, and not to the heirs of the deceased.

4th. The Court below erred in refusing to instruct the jury in relation to the measure of damages.

On the first point, the doctrine of voucher contemplated by the common law, was relied on. Reeves Hist. Eng. Law 438. 4 Mass. Rep. 135.

In support of the second, the counsel relied on 2 Saund. 178. Nokes' case, 4 Co. 80. 3 T. R. 584. Cro Eliz. 674, 833, 917. Cro. Jac. 315, 444. 1 Lev. 301, and of the third position. 2 Johns. Rep. 1 Hob. 188. 2 Lev. 25, 26. 4 Johns. 72. 1 Vent. 176, 347. Bac. Ab. tit. Covenant E.

To shew that the Court erred in relation to the measure of damages, the following authorities were cited: 2 Bl. Rep. 1078. 4 Dall. 436. 1 Hen. and Mun. 201, 3 Caines' Rep. 111. 4 Johns. 1. 125. Kaims Prin. Eq. 206. Sugd. 157. No. Carolina Law. Rep. 77. 4 Johns. 72. 4 Mass. Rep. 465. 3 Johns. 471.

The counsel on the other side relied on Kirby's Rep. 3. 2 Mass. Rep. 433. 4 Mass. Rep. 108. 2 Mass. Rep. 455. 2 Saund. 181. n.

The last point having pressed itself on the mind of the Court, and being most extensive in its influence on society, will be first considered.

1st. A construction of this covenant will be attempted, with a view of the principles of the common law.

2d. With a view to the existing mode of redress on such a contract, and the consequences of the disuse of

Note by Judge Overton.

* Judge White, the other judge of the Court of Appeals, agreed in the result and material points of the above reasoning, but I have not, as yet, been able to procure a copy of his opinion.

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the ancient modes, in relation to the general law of contracts.

The language of this convenant is, that the plaintiff binds himself, his heirs, executors, &c. to warrant and forever defend. This is precisely the same phraseology employed in the common law general warranty. It was a covenant real, running with the land. In many particulars it differed from a personal covenant, or covenant in gross, which will be particularly noticed in the discussion of the second position. The benefits resulting from the covenant descended to the heir of the warrantee. In case of the warrantee's being sued, his remedy was by voucher, and when that remedy did not apply, by *warrantia chartae*. In either case, a recovery was made, not in money, but in land of equal value with the land warranted. And this value was to be estimated at the time of the contract of warranty, not at the time of eviction, nor recovery in value.

A claim to real estate, by Blackstone and other writers, is considered in the compound view of a right of property, right of possession, and possession itself.—A warranty was an assurance of all three, and particularly the first, or title. This is the means by which the other two were attained and preserved. Title, was an important object of the contract, for by finishing thus, the warrantee was at all times able to defend himself when impleaded. Hence, agreeably to the terms of the contract, the warrantor being obliged to defend, must be vouched, whenever the warrantee was sued. He received notice of the institution of the suit, and to come into Court and defend the title in the place of the warrantee, agreeably to his engagement; if the title of the warrantor, thus made, defendant proved defective, the warrantee recovered in value other land. By title, here, is meant such a one as would bar the plaintiff of a recovery. If the action were possessory, a superior possessory title would be sufficient, but if droitural, the warrantee must show one superior to the plaintiff, so as to preserve the possession of the terretenant or warrantee. A complete assurance of perpetual enjoyment of the land being the object of the warranty in fee, it followed as a ne-

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cessary inference, that if the warrantor had not a complete title, at the time of the warranty, that his contract was broken in a material part, as soon as made.*

This is demonstrated by the warrantee having it in his power to bring a suit on the warranty before being sued himself, and none can have voucher or *warrantia chartae* but the terretenant. He may have *warrantia chartae quia timet implacitari*, but no execution shall be awarded, or in other words, no recovery in value shall be made until eviction in due course of law.—This judgment as it is termed, *pro loco et tempore*, bound the warrantor's lands which was the principal object. Thus it appears that the warrantee or terretenant was not obliged to wait until he was sued, before he could commence suit, which in many instances, if it were otherwise, would have proved ruinous; for the purpose of bringing suit, the contract was considered as broken at the time of its being entered into, in consequence of the warrantor's not having an indefeasible title.

It is not necessary to inquire into the distinctions between a covenant of warranty, affecting the realty, and covenants in gross, or personal covenants. In England, the ancient warranty, or such a one as that before the Court, has fallen into disuse for nearly two hundred years, and covenants in gross substituted in its place; such as are mentioned in Sugden, 295.—With the introduction of these covenants, the ancient modes of proceeding by voucher, and *warrantia chartae* have ceased, and the common action of covenant taken their place. By some, the ancient warranty has been compared with, and esteemed equivalent to, a modern covenant for quiet enjoyment. This seems to be an imperfect view of the subject; the warranty of the common law, went farther than a bare covenant for quiet enjoyment; it extended to the title, which is not primarily contemplated by the other; that relates to the possession alone. It is more analogous to a covenant of seisin of an indefeasible estate. As it respects modern covenants, it is inclusive of a

* 22 Vin. Ab. 419, 420, 421 427

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covenant of seisin of an indefeasible estate—a right to sell; and *as to the mode of redress*, of quiet enjoyment. But, as covenants in gross cannot be extended by equitable construction, each must depend on the words used.*

Thus, agreeably to the English law, a covenant of seisin simply, and a covenant of seisin of an indefeasible estate, convey different ideas. In the first case the covenantor may be seized of an estate, and yet not of an indefeasible estate. So, as to quiet enjoyment, the covenantor may not be seized of any estate by title, and if the covenantee enjoy without disturbance, the covenant is not broken.

2d. It is important to consider the existing mode of redress, and its consequences. It is agreed on all hands, that those used anciently, were by voucher and *warrantia chartae*, and are no longer in use. Even on the common law warranty, as this is, an action of covenant must be brought. 2 Mass. Rep. 438. No. Carolina Law Rep. 81. It is further admitted, that instead of the recovery in value of land, as was contemplated at common law, the recovery must now be made in damages, and thus we are led to consider this contract on the broad basis of contracts in general.

Contracts divide themselves into those which are *executed*, and *executory*.† Mr. Sugden, in his valuable treatise on vendors and purchasers, has made no distinction in principle between real and personal contracts. It is believed the law of contracts is the law of reason, nor can any ground of distinction be perceived, as it respects the measure of damages, on a breach of contract, between those which relate to land, and personal property. Agreeably to ancient practice, damages, on breach of contract, was left very much to the discretion of juries; but in the gradual improvement of the science of law, particularly as relates to this subject, that which was formerly left in a state of uncertainty, is now reduced to settled and permanent principles.

* Bac. Ab. tit. covenant B. P. Twisden, J. 3 Burr, 1635. 4 Hall's Law Journal, 137.

† Bull N. P. 132. Com. Dig. tit. agreement. A 2 A 3. Burr. 2162. 1 Pow. Cont. 152.

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As to damages arising from torts, they must from necessity remain in a state of uncertainty; on this side of the limits of extravagance; not so respecting the *quantum* of damages arising from breach of contract.

As a rule of justice, it may be safely stated that, in all cases of contract for the delivery or conveyance of property, either real or personal, or for services to be performed, when the contract is unattended with fraud, deceit, indulgence, or delay of the obligee; and where the sum to be paid, or duty to be performed, is specific and known to the obligor—and the contract either fails, or there is simply a delay of execution—the value of the property or services to be performed, at the time of the execution, or intended execution of the contract, with interest thereon, should be the measure of damages, and must be considered as the rule of law by those who have made the modern books their study. An agreement respects something done, or to be done; in other words, *executed* or *executory*. As defined by Plowden, *agregatio mentium in re aliqua facta, vel facienda.*

Formerly, interest, was only allowed as a compensation for delay in the payment of money. This rule has gradually been extending itself to contracts for property, estimating the value of the property in money, at the time the contract should have been performed, allowing interest thereon until the time of the judgment. See 2 Hayw. 334. 336. 2 Call. 95. Hardin. 31. 3 Call. 300. Burr. 1171.

I am aware, that most of these authorities do not contemplate interest on the value of property, but it is surely most conformable to that certainty in which the law delights, as well as to the nature of interest, agreeably to the modern books. It is intended as a recompense for the delay, in not performing some duty, the certainty of which is known to the person imposing an obligation on himself.

If the demand be unliquidated or uncertain, interest cannot be allowed. On the ground of reason and some of the authorities, it is not material whether the duty to be performed be in money or property. The

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same injury arises from non-compliance, and why should not the same measure of compensation be applied, where the obligor knew what he had to do.

Whenever agreements will admit of it, we have perceived a laudable disposition in the courts of justice to substitute certainty for uncertainty, in relation to the compensation in the non-execution of contracts. Ordinary interest, as such, or in the form of damages, seems to have been wisely adopted as the principle of this substitution. It nearly concerns a civilized and commercial people, that individuals should know the result of failures to comply with contracts honestly made.

The law presumes all contracts are *bona fide*, nor will it presume the reverse;* it is on this presumption, as well as on the spirit of the act of 1786, c. 4. s. 5. that the above general rule with respect to the measure of damages, is founded. Where it shall appear that dishonest or fraudulent practices, or conduct, in the formation, or delaying the execution of a contract, has taken place, a different rule must apply. When a man who has contracted to deliver or convey property, or to perform services fails to do so, the law will presume that the person with whom the contract was made, would have derived benefit from such contract, equivalent to the interest of the money, which represented its value.

Reasoning like this, is peculiarly applicable to this country, where, owing to the newness of the settlement, titles are perplexed and unsettled. The most conscientious man may believe he has a good title to land, to which a better one is afterwords discovered. To make the vendor pay for increased value, or improvements of land, under such circumstances, would not only be repugnant to the genius of the common law, but such an intolerable burthen, that few discreet persons would be willing to incur such a responsibility. In such a measure of justice, we should not only depart from the common law, in paying cash instead of land, which is much more easily obtained, but pay

* 1 Johns. 551. 3 Johns. 281. 7 Johns. 605.

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more than that law contemplated. Why should there be any difference as to the measure of damages, on non-compliance, between a contract for real, and personal property? In the first case, a person, when selling, must expressly stipulate for the goodness of the title; if he do not, the law presumes the buyer took all risques on himself. Different, in this respect, is the sale of personal property; the seller impliedly warrants the title. This difference only relates to the manner in which an obligation arises. When the subject matter of the contract fails, in either case, the measure of damages is the same; if an *executed contract*, the consideration and interest, if *executory*, which contemplates some future act to be done, then the value of the property, (where none is expressed) at the time the contract contemplated an execution of the agreement, with interest thereon from that time.

In all cases respecting real or personal property, the language of the Court of Appeals in Kentucky, may be adopted. "It is conceived that the value of any "personal property on the day it is bargained to be "delivered, together with the legal interest thereon, is "the most equitable general rule by which to ascer- "tain damages where there is a failure of compliance. "Indeed, when the property is of a perishable nature, "or is wanted for immediate use or market, no other "just rule can be discovered."* Perishable, or not, money is the only medium, in which an injury is estimated. Every species of property is capable of alienation for money, and the more easy, and the less encumbered such alienations are, the better for society. In this view, it is material that vendors and purchasers should know the consequence, or amount of compensation for failures to comply with contracts, honestly made, and with *bona fide* intentions to comply.

In the case before the court, the contract has failed in part. Of 640 acres conveyed and warranted, only 540 have been lost, and no fraud, or other peculiar circumstances appear. The first rule of estimating damages in this case is, by taking the whole tract at

* Hardin 31

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what it cost, with the interest, and calculating it, in parcels, according to the particular value of each parcel, and in proportion to the cost and interest of the whole. In this manner, the particular value of the part lost, may be ascertained. The part lost might have been of much greater or less value on account of water, quality, &c. than the part held; and consequently to estimate damages simply according to the number of acres, in proportion to the purchase money, and interest, would have lost sight of the quality, and operate unjustly. 5 Johns. 49.

The contract under consideration, *as to title*, is certainly an *executed* one; it is an assurance of an indefeasible title, and though the time of ascertaining whether such title existed, or not, were deferred till eviction, it would relate to the time of the execution of the contract. Since, *as to the mode of redress, warranty is now considered as a personal covenant*, and consequently a right to sue not confined to the terre-tenant, it is not necessary that a right of recovery should depend on eviction in due course of law.*

The principal object of the contract, being an assurance of title, if that did not exist at the time of making the warranty, any person entitled to its benefits, as the heir or assignee, may bring an action of covenant, immediately, or at any time after such warranty made, recover, and as the law is now understood, have executions, as in other cases. To stop after obtaining judgment, and defer satisfaction until suit and eviction may take place, as the law was formerly understood, will oppose the existing analogies of the law of contracts, and of property—leave the warrantee liable to loss, if not ruin, by the insolvency of the warrantor; and beside, produce injurious restraints on the alienation of real property, by the lien of judgments. It may not, however, be improper to remark, that after judgment against the warrantor, the warrantee may be considered as his tenant at will, and equity may

* By Tennessee Laws, 1805, c. 11, persons out of possession, are authorised to sell and convey their titles to lands, in as full and ample a manner as if they were in actual possession, although others may be in possession, claiming adversely.

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restrain him from making the amount of the judment, by execution, until a surrender of the land warranted.

If the warrantor acquire a good title, subsequent to the warranty, and before action brought, perhaps he may make it available; this point is not decided.*

In relation to *interest*, See act N. C. 1786, c. 4. s. 5. 1 Hayw. 142. 1 P. Wms. 395. 1 Atk. 4. 1 Johns. 315. 6 Johns. 45. 2 Johns. 280. 2 Hayw. 17. 4 Dall. 289. 3 Hen. & Mun. 448. 548; and as to damages, 1 Johns. 223. Add. 23. 4 Johns. 125. 1 Bay. 105. 357. 5 Mass. 437. 4 Am. Law Journal 147. 4 Mass. 109. 2 Mass. 455. 1 Mass. 125. Sugd. 912. 312, 313. 373. 151. 157. 327.

From this examination it appears, that the Court erred in refusing to charge the jury as requested, and also in permitting evidence to be received of the value of the land at the time of eviction, as well as at the time of the trial.

The first exception taken by the plaintiff's counsel, that the plaintiff did not receive notice of the eviction, so as to be able to defend it, is not tenable. When the remedy or warranty changed, many of the consequences of the antient modes of proceedings ceased with it; as notice by voucher,—that none but the terre-tenant could sue on the warranty,—and recovery of other land in value.

In any case of covenant to indemnify, the obligee, if sued, may, or may not, give notice to the obligor to come in and defend the suit. If he do, the obligor is bound by the verdict, but if he do not, the obligor may contest the former verdict, in an action brought against him.

Nor can the second exception of the plaintiff's counsel be supported. The declaration is well enough; it is as broad and minute as the covenant, and that is all the law requires.

There was no necessity to set out the particulars of Donelson's paramount title.

3d. This exception is "that the breach took place "in the life time of the ancestor, whereby the right of

* See 4 Cr. 4. 21. 4 Dall. 436. 4 Johns. 1.

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"action accrued to the executors, and not to the heirs "of the deceased."

Though the mode of redress, and medium of compensation on warranty, is changed, the rights of parties are not thereby altered. This part of the subject not having been much spoken to at the bar, some doubt existed, but on further consideration, it appears clearly, that the impression of Judge White is correct, and that the action is proper in the names of the heirs. Had the ancestor brought an action on the covenant, his personal representives would have been entitled to its benefits. As this was not the case, the warranty descended to the heirs, as at common law; they are entitled to the benefits of it, and consequently to a compensation for its failure.

The authorities referred to at the bar, Vent. 175. 2 Lev. 26. and Bac. Ab. *tit.* COVENANT E. relate to covenants in gross, and not to covenants of warranty, as understood at the common law. This is manifest, by reference to Bac. Ab. *tit.* COVENANT C. where it is laid down as "the better opinion that, upon the evic- "tion of a freehold, no action of covenant will lie "upon a warranty, either in deed or in law, for the "party might have had his *warrantia chartae*, or "voucher."

On the 4th ground of argument, taken by the plaintiff's counsel, the judgment must be reversed, and the cause remanded to the Circuit Court, for further proceedings conformably to this opinion.

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TENNESSEE—SUPERIOR COURT OF LAW AND EQUITY.

Hamilton District, March Term, 1807.

COULTER'S Lessee, *v.* HODGE.*

Statutes explanatory, how far they shall affect vested rights—Exposition of the words "*Treaty or Conquest.*"

EJECTMENT. The plaintiff exhibited a grant (upon a county entry, or fifty shilling warrant) dated 27th July, 1793, No. 464, to John Coulter for 400 acres on both sides of German Creek.

For the defendant was produced a grant to Richard Mitchell, for 640 acres, dated 26th December, 1791, No. 185, which issued in consequence of a county warrant, and which interferes with all the plaintiff's claim except about 150 acres. Upon this grant, being older than the plaintiff's, the defendant rested his case.

In order to invalidate the grant of the defendant, it was stated by the plaintiff's counsel that the entry on which Mitchell's grant issued was void, having been made below or west of the line usually called Brown's, being the line contemplated as the eastern boundary of the Indian reservation, agreeably to the 5th sect. of the act of April, 1778, c. 3. Iredel's Rev. 352.

A copy of the entry, signed Landon Carter, for John Carter, was produced by the defendant's counsel. The reading of this entry was objected to on three grounds. 1st, Proof ought to be made that Landon Carter was the deputy of John Carter. 2d, From the certificate of the surveyor annexed to the grant, it does not appear that this is a Carter's warrant—it might be from some other office. 3d, From the certificate of the surveyor it does not appear that the land surveyed is the same that was entered.

WHITESIDE and CAMPBELL, *contra.* On the second of February, 1778, when this entry was made, there was no other county entry taker's office than that for

* From the manuscript communicated by Judge Overton.

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the county of Washington, or Carters, west of the mountain in N. Carolina. The counties of Sullivan and Green, or Adair's and Hardin's county entry taker's offices, came into existence afterwards.

The objection respecting the certificate of the surveyor, cannot bear a moment's consideration; if tenable, it will be impossible, in nine cases out of ten, to deduce a land title from the entry.

Overton, J. sitting alone, *White*, J. having been of counsel, and *Campbell*, J. absent. It istrue, as stated by the plaintiff's counsel, that there was not any other office west of the mountain, than Washington or Carters, on the 2d of February, 1778, when this entry was made. Sullivan county was erected in May, 1779, Iredel 395, Green county, in April, 1783, Iredel 473; of these two counties, Adair and Hardin were appointed entry takers. The surveyors' certificate, does not specify the county from which the warrant issued, but this is not unusual; perhaps more frequent in surveys on removed warrants than any other. It, however, expresses the number of the warrant, which of itself, upon comparing the description given in the surveyors' certificate or grant, might discover whether the survey was made in pursuance of the entry; but when we consider that there was no other office in February, 1778, it is evident the surveyor meant a Carter's warrant. The entry No. 68, in Carter's office, was made in the name of Thomas Haughton, and transferred to Richard Mitchell, situated on German Creek, beginning near the fork of the creek, and running down on both sides: so is the copy now produced. Whether this entry, by its known calls, will interfere with the claim of the plaintiffs, the court cannot know; the jury must determine this point, being matter of fact. The objection that the copy cannot be received as evidence until proof of the deputation of Landon Carter, cannot be supported. The court can judicially know the acts of all officers known to the laws of the state, acting therein, and their deputies. Therefore, knowing that John Carter was entry taker, that Landon Carter acted as his deputy, and that this

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copy is his act, let it be received in evidence. Independent of this knowledge, if an office be known to the laws, a copy certified by a person who states his official capacity, will be presumed correct, unless the contrary appear.

Mr. Cobb, who lives adjoining Bean's station, was called as a witness respecting Cloud's Creek; he stated that the mouth of Cloud's Creek was in Hawkings county, on the north side of Holston, about fifteen or sixteen miles above where he resided, and that the land in dispute is nearly that distance westwardly or below the mouth of that creek.

Counsel for the Plaintiff. The grant to Mitchell is absolutely void. The land where Haughton's entry was made, was at that time within the Indian boundary, and all entries made therein were declared void by the act of April, 1778, c. 3; the act directs the entry takers to refund all moneys received by them on such entries. Haughton, or Mitchell, who now claims under this entry, should have applied for, and received his money as this acts directs.

The 5th section points out the limits of the Indians westwardly of the line mentioned in these words, "Beginning at a point in the dividing line which hath "been agreed on between the Cherokees, and colony "of Virginia, where the line between that common- "wealth and this state (hereafter to be extended) shall "cross or intersect the same, running thence to the "north bank of Holston river, at the mouth of Cloud's "Creek," &c. "And that all entries and surveys of land "heretofore made, or which hereafter may be made "within the said Indian boundary, are hereby declar- "ed to be utterly void and of no force or effect; and "the entry takers for the counties of Burke and Wash- "ington, are hereby strictly commanded immediately "to refund to the proper persons, all sums of money "by them received for the purpose of any entry with- "in the Indian limits as aforesaid."

The section commences with a prohibition that no person shall presume to enter or survey any lands within the Indian hunting grounds. In fact, the act under which it will be attempted to support the claim

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of the defendant, Nov. 1777, c. 1. s. 3. shows decisively that it never was lawful to make this entry. The act opens offices in each county, for all such lands as "have accrued or shall accrue to this state by *treaty or* "*conquest.*"

The land entered by Haughton in February, 1778, had not then accrued to the state either by treaty or conquest, which appears evidently by the 5th sect. of the act of April, 1778, for the legislature expressly say that it had belonged to the Indians. But to elucidate this matter more perfectly, if it can be done, we will, in the language of the act of 1778, (referring, we presume, to the ideas of *treaty* or *conquest*, in the act of 1777,) show what land had, before the passage of the act, 'been ceded by the Indians, or conquered from them.' Here is a certified copy of the treaty with the Cherokees, usually called the Long Island treaty.

This paper was certified by the secretary of the state of N. Carolina, and authenticated by the signature of the governor and seal of the state.

It purports to be an agreement between commissioners of N. Carolina, and the Indians, near the long island or Holston, July 20th, 1777. The 5th article of this agreement specifies the boundaries, which are the same as in the 5th section of the act of 1778, above alluded to. This agreement or treaty, places beyond a doubt what lands had accrued, or had been *ceded* or acquired by *conquest.* All west of these lines were relinquished to the Indians for their hunting grounds. But illustrations do not stop here; the legislature of N. Carolina more than once expressed their sense on the subject of these entries, declaring them void. The act of April, 1783, *c.* 2 after enlarging the boundary we have been speaking of, westwardly to the extent of the limits of the state for John Armstrong's claims, (saving to the Cherokees a portion of hunting ground by the 5th section,) proceeds to enact in the 6th section, "that all entries of lands heretofore made, or grants already obtained, or which may be hereafter obtained in consequence of the aforesaid entries for lands westward of the line, contemplated by this act, be, and the same are hereby declared to be null and void

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to all intents and purposes, as if such entries and grants had never been made or obtained."

The grant under which the defendant claims is one of those described in this section. The grant to Mitchell is, therefore, a perfect nullity; but lest it may be objected that our grant is equally so, being on a county entry and below or westwardly of Brown's line, as well as the defendant, let it be remarked that this grant issued upon a removed warrant. Though the entry in its commencement was similarly situated with the defendants, it was surveyed after the treaty of Holston in July, 1791, when the Indian claim was extinguished.

The 7th section of the act of April, 1784, *c.* 14. shows that we had a right to remove our warrant from the place entered. Our grant has been legally obtained.

Williams, in reply. It should be shown that N. Carolina had a right to make a treaty with the Indians, and if that were done, it ought to be shown that the treaty was ratified, neither of which appears in relation to the treaty at fort Henry near the Long Island of Holston.

The grant of the plaintiff is void, having been made or obtained upon a removed county warrant, which the law never authorized. The 7th sect. of the act of 1784, was intended to embrace John Armstrong's claims alone. It is admitted that the greater part of the lands east of Cumberland mountain, and west of Brown's line, are held on removed county warrants, but this cannot make that legal, for the doing of which there never existed any law.

It has been insisted by the plaintiff's counsel that we ought to show, agreeably to the act of 1777, that the land had accrued to the state by treaty or conquest.

My answer to this is, that the law will presume it, and it will be incumbent on the other side to rebutt this presumption. *Statur presumptioni donec probetur in contrarium.*

Overton, J. The first inquiry with the court will be, whether N. Carolina had power to make a treaty

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with the Cherokees, residing within her chartered limits, in July, 1777.

In December, 1776, that state declared herself independant, and free to exercise all rights of sovereignty. She continued in possession of these unlimited rights of sovereignty, until July, 1778, when she subscribed the articles of confederation, and resigned some part of her sovereign power to the general government. When the treaty of Fort Henry was made, N. Carolina was in possession of unlimited powers of sovereignty as a state, and could rightfully make such a treaty; but whether under all the circumstances disclosed to the court, it acquired the obligation of a public law, is another question.

In the copy produced, the persons making the agreement, style themselves commissioners on the part of N. Carolina; their powers, however, have not appeared, either by a resolution or law of the legislature; their commission, the authority of the governor to appoint them, nor any subsequent ratification by that government; but it does not seem absolutely necessary to take this part of the case into consideration, for the great and important points in this case are, whether the agreement was ever promulgated in such a manner as to become a law of the land; or was the act of 1777, *c.* 1. in itself so explicit as to treaty boundaries, as to be intelligible at the time it was passed, in the manner contended for by the plaintiff.

Had this been an act of the legislature, it would have been obligatory from its date, for every person may be presumed to know immediately, what is done by his representatives, but not so relative to the acts of the agents of the legislature, or executive; they must be promulgated in some shape, either by the executive or by means of a legislative act. Unless this were done, it surely would be contrary to the immutable principles of the law of nature, the first principles of our government, and the very definition of law, to suppose it obligatory or as furnishing a rule of action. It does not appear that the treaty as it is called, was ever published among the acts or resolutions of the government of N. Carolina: Therefore, as a law or

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an act of the government, it cannot be noticed by this court.

Was there any other treaty to which the act of 1777, could refer? The only treaties made with the Indians of which the court has any knowledge relative to the lands of this country, took place since that act; they are those of Hopewell, in January, 1786, Holston, in July, 1791, and the late treaty at Fellico.

The term *conquest*, used in the act of 1777, is so indefinite as to be incapable of definition, otherwise than by the law of nations, where every thing is uncertain between two states during a state of war, and the extent of conquest settled at its termination by treaty. But this is not the ground on which the act should be examined, as it seems evident that the legislature did not mean to include the idea of *treaty* in the expression, *conquest*. Hence it would seem, that there remains no other mode of ascertaining the limits of *conquest*, in the view of the legislature, than *possession* by the citizens of the conquering country.

No treaty has been resorted to by the plaintiffs counsel, previous to the act of 1777, as settling the limits of *conquest*.

The next inquiry is, whether the legislature have in their act of 1777, exhibited clearly their meaning in relation to the limits within which lands should be sold, by reference to matters of fact.

There were treaties made with the Indians respecting territory in almost every state in the union, under the authority of the king of England before the declaration of independence. The usual mode of making them known was by proclamation. These treaties or agreements, it is believed, will be found among the archives of the executive departments of some of the states. It is probable some lands might have been conquered from the Indians; and held without treaty. No instance, however, is recollected previous to the revolution of a state relying on conquest alone. In a variety of instances in different states, lands claimed by the Indians were settled by the people long before any treaty: But treaties afterwards generally included there settlements.

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The difficulty in this case arises principally from the expression *treaty*, which may be satisfied by reference to the treaties under the colonial government. Whether it can or not, seems unimportant, as the general principle of the act of 1777, c. 1. is found in the disposition of the legislature to dispose of their vacant lands; and an exception or limitation of the principle should have been so expressed as to be susceptible of certainty to a reasonable intent. 3 Cranch, 70, 71. (*)

In the passage of the act of 1777, the legislature of N. Carolina, brought into action its great and efficient means of procuring funds to carry on the war of the revolution. The principal object was to sell as much land as was practicable; and it is manifest that not much nicety was intended, respecting the limits within which entries might be made; or the legislature would have used more definite language than "all such lands as had accrued, or should accrue by *treaty*, or conquest." War with the Indians was not an uncommon occurence, and it is not improbable that it was an expectation of the Cherokees adhering to the British nation, with which N. Carolina was at war as well as a common desire to possess their hunting grounds or lands, that gave rise to the particular phraseology employed in this act, in relation to the lands intended to be sold. War between the whites and Indians usually commenced by acts of hostility, either by or against the people on the borders, who have generally succeeded against the Indians, settled their lands and erected forts on them; all this took place after the commencement of the revolution, and previously to the adoption of the federal constitution, without the express order of the government. Thus were *conquests* made, and in this way it is believed N. Carolina expected "lands would accrue"

(*) It has been understood by the reporter that the treaty of July, 1777, was laid before the legislature of N. Carolina at their session in Nov. 1777, being the same session the act under consideration was passed; and that they were so much opposed to its provisions that they refused not only to ratify it, but to make any appropriation to pay the commissioners appointed by the executive, or to take any step in confirmation of it.

The 5th section of the act of April, 1778, c. 3. was the first act of the government of N. Carolina, which recognised this agreement at fort Henry as a treaty, or an obligatory act.

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undefined as to limit, and yet they meant to dispose of all lands that "should accrue by conquest." Suppose a state of hostility had taken place on the first of December, 1777, and the citizens of N. Carolina had driven the Indians from the neighbourhood of the defendant's entry, took possession, and the civil authority and laws had been actually extended to the people then recently settled, previously to the act of April, 1778, would not that part of the country be considered as conquered in fact, and in such case could any dispute be raised respecting the defendant's entry? There certainly was a hostile dispute respecting the country in which the defendant's entry was made about that time, and it would be difficult to show that it was not conquered. As the lands entered lay within the county of Washington, at the time the entry of the defendant was made, the presumption of law is that it was rightfully made, and it lies on the plaintiff to prove that it had not been acquired by *treaty or conquest*, so as to overturn this presumption.

The entry was made forty or fifty miles north of the Tennessee river, and all the Cherokee Indians were settled on the south of that river. Neither whites nor Indians were settled in the neighbourhood of the entry; the citizens of N. Carolina were most contiguous to it. It is understood that there are but few 600 acre-tracts, that were entered over the line referred to in the treaty of fort Henry, commonly called Brown's line, previously to April, 1778, when the explanatory act passed.

No other medium of information is offered, or known of by the court, but the legislative acts of N. Carolina, as to the territory over which they had or intended to exercise a disposing power, except as above mentioned. Between these parties, claiming under grants from the same government, the acts of the legislature of that government, appear to be unexceptionable evidence respecting the *territory they had a right to dispose of*, all things being in *statu quo*, at the time of acquiring the two titles.

If the state of things were the same, the legislature had the same power to sell the land in question in Nov. 1777, that they had in April, 1778, or April, 1783.

There cannot exist in the mind of any man a doubt,

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that they had a right to dispose of their western territory in April, 1783, when they opened John Armstrong's office, for the sale of lands, all over the state, except the counties of Washington and Sullivan, circumscribed to Brown's line (being the same referred to, by the act of 1778, c. 3.) on the east, with the Indian hunting ground, and land reserved for the officers and soldiers, as expressed in the 6th & 12th sections of the act of 1783, c. 2. That the state of N. Carolina, had the right of eminent domain, to all territory within its chartered limits, is certain, for they have asserted this right in the 25th section of their bill of rights. When N. Carolina opened John Armstrong's office in April, 1783, they had a right to sell; at least, as respects the dispute between these parties, they had the same right to sell to Haughton, under whose entry the defendant claims, in Feb. 1778, as in April, 1783, for things were precisely in the same state, both as to *treaty* and *conquest*.

Is there then any evidence before the court, that our limits of territory within the state of North Carolina, were defined by *treaty* or *conquest*?

The act of 1777, c. 1. opened offices for the sale of lands in every county of the state, of which Washington, being then her western county, was one. An office was opened in this county, and what were its limits; an act passed at the same session with the land law of 1777, c. 31. Ired. 346. showing that it included what is now the limits of this state, or all that part of N. Carolina, which lay west of the Apalachian mountain, and consequently the land in dispute, was within it; there being no specified limits, as to treaty or conquest, the entry was legal by that act. Under the act and the entry in consequence of it, a right was acquired, and the question is now, not whether the state of N. Carolina had a power to withhold a grant upon it, for one has been made, but whether the grant shall be considered by this court as void and no effect.

The bill of rights of N. Carolina in substance secures the right of property inviolate. It is one of the first principles of all republican governments, Vanhorne v. Dorrance 2 Dall. 304. to 320. 1 Cranch, 30 in *n.* 3 Cranch. 70, 71.

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N. Carolina had a power to withhold a grant and no power on earth could coerce her, but she has granted this land, when by her acts of 1778, and 1783, she had said she would not do it. Previous to these acts, she had by her act of 1777, agreed, upon receiving the consideration, to convey this land. That consideration was received, and thence by the law of nature, she was bound to convey, unless the person entering, Haughton or his assignee, would rescind the contract and take back his money. He did not think proper to do this, nor had the state the power to use compulsion, otherwise than by withholding a grant. To have done so, with an intention of depriving the individual of a right under his entry, would have been a violation of private property, to which no state is morally competent. A state may use private property where the public safety requires it, upon giving a just and impartially estimated equivalent; *salus populi suprema lex est.* 2 Dall. 304. to 320.

Here is a grant, with all the legal forms required by law, which the state of N. Carolina were bound to make by the ties of natural justice, having sold the land and received a valuable consideration, and whilst I sit here either in a court of law or equity, I never can say it is void.* The act of April, 1778, could not devest a right. Explanatory acts uniformly operate in futuro, and therefore any entry made west of Brown's line, after the act of April, 1778, c. 3, and before the act of 1783, would be void. But such acts cannot have a retrospective effect, except in cases where the original act of the legislature may be doubtful, and where various practice under it still leaves it so; or where it is completely open to legislative construction, by the absence

* Upon the same principles, the case of Mitchell v. Smith, respecting a valuable island in Holston river, in the lower part of Hawkins county, was determined by Campbell, M'Nairy and Anderson, Judges, in September, 1794, at Jonesborough. It was argued by Overton, for plaintiff, and then determined, that agreeably to the act of November, 1777. c 1., it was lawful to enter lands over Brown's line at any time before the explanatory act of 1778. That the plaintiff having acquired a right by entry, the legislature had no power by their act of April, 1778, c 3. sect. 5. to deprive him of it without his consent. The argument from the maxim *communis error facit jus*, had considerable weight on that trial. The jury found a verdict for the plaintiff, and he had judgment.

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of vested rights. No subsequent act can devest a right previously and legally acquired. The act of 1783, so far as respects this subject, may be considered in the same retrospective light.

The counsel for the defendant insists upon having the oldest grant, which, it is contended, ought to prevail in a court of law. Upon this part of the case I never entertained but one opinion, *but that opinion was overruled by a majority of this court. The entry is before the jury, and it must remain there. Nor is it absolutely necessary to consider the objection taken by the defendant's counsel, to the grant of the plaintiff, as having issued upon a removed county warrant. Let it suffice, at present to state, that I am strongly inclined to think that county warrants could be removed to any part of the state, except the country south of French Broad and Holston, reserved to the Cherokees by the 5th section of the act of 1783, c. 2. and the military reservation, but on this point, no decisive opinion is given.†

Verdict for the defendant.

* See the opinion of Overton, J. in the case of Vincent's lessee v. Conrad, 4 Hall's Law Journal.

† This point has been since solemnly decided agreeably to this intimation of Overton, J.

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THE YAZOO QUESTION.

THE CASE
OF THE
GEORGIA SALES ON THE MISSISSIPPI CONSIDERED:
WITH A REFERENCE TO
LAW AUTHORITIES AND PUBLIC ACTS;
AND AN
APPENDIX,
CONTAINING CERTAIN
EXTRACTS, RECORDS, AND OFFICIAL PAPERS.

By the Honorable ROBERT GOODLOE HARPER,
A Member of the Senate of the United States.

[The following piece was drawn up at the request of some gentlemen who were interested in the purchases of land on the Mississippi and Donbigby, made some years since, from the state of Georgia. It was their object to obtain not merely a legal opinion, but such a statement and examination of the subject, as might enable persons inclined to inquire into it to understand the case, and judge for themselves. The Editor, being desirous of preserving the history of this memorable transaction, applied to his friend for that assistance which he is so well qualified to give on every subject connected with our history or laws; and obtained the following papers, with permission to insert them in this Journal.]

THE opinion of counsel is required on the following points.

I. Whether any claims of the United States can affect the purchases of land made from the state of Georgia in 1795, by the upper Mississippi and Georgia companies, or either of them?

II. Whether those purchases can be affected by the act of the Georgia legislature, passed February 13, 1796, and commonly called the repealing act?

In answering the first of these questions, it will be proper to consider the claims of the United States under two points of view: first, as they respect the state of Georgia itself; and secondly, as they respect the

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purchasers under the state. For, though, in general, purchasers stand, as to all legal intents, in the same situation with the vendor, there may be particular circumstances which will create a wide difference between them. It will be proper to inquire whether these lands, or any part of them, belonged to the United States at the time of the sale? and, in that case, whether it was attended or preceded by any conduct on their part, which will render it valid against them in the eye of the law?

In discussing the question, "Whether any part of "these lands belonged to the United States, at the time "of the sale," we must carry back our attention to the first discovery of North-America, and take a review of the various public acts by which the rights of soil and jurisdiction, to that part of it, where the lands in question lie, have been affected from that period to the present time. Such other transactions as it may be necessary to recur to in other parts of the investigation, though they have no immediate relation to this point, will, for the sake of perspicuity, be noticed in the order in which they occur.

It was a principle admitted by all the European nations in the establishment and regulation of the American colonies, that prior discovery, accompanied by actual occupation, and, in some cases, without it, vested the right of soil and jurisdiction. Spain thus acquired her extensive dominions in South America; and, by the same title, she laid claim to Florida, in the southern parts of the North-American continent. England, also, by virtue of discoveries made under her flag in the reign of Henry VII. claimed the whole extent of North-America, from Florida to Hudson's bay. The boundary between her discoveries and Florida, remained for a long time, uncertain, and was frequently the subject of dispute between the two crowns. She claimed, however, as far south as the latitude twenty-nine; and Spain at length ceded Florida to her, which put an end to the contention.

England made settlements at a very early period, in the northern and middle parts of this extensive region; and erected governments, which now compose

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the states from Virginia to New-Hampshire, inclusive. These governments were of two kinds, royal and proprietory. In the former, the right of soil and jurisdiction remained in the crown; and their boundaries, though described by its letters-patent, were subject to alteration at its pleasure: for, as it possessed the rights of soil and government, and delegated them to its governors during pleasure, it might dispose of them in what manner, and to whom, it thought fit; might alter, extend, or abridge, the delegation, as its inclination or policy might dictate. In the latter, the proprietary governments, the right of soil, as well as jurisdiction, was vested in the proprietors. Their charters were in the nature of grants; and their limits, being fixed by these charters, could not be altered but by their own consent. This distinction is particularly noticed here, because in the progress of the discussion it will appear to be of very great importance.

Most of the governments were at first proprietary; but, in progress of time, the greater part of them, either by the forfeiture or surrender of the charters, became royal.

The first of these charters, under which any settlement took place, was given by queen Elizabeth to Sir Walter Raleigh, in the year 1584.* Like the previous charters from her and Henry VII. to Cabot, Sir Humphrey Gilbert and others,† it was merely a commission to discover any countries not occupied by Christian people, to take possession of them, and form settlements under the allegiance of the crown of England. It also prohibited any other persons from settling within two hundred miles of any place where he should form a settlement, "within six years." Under this charter he made two settlements: one south of the Chesapeake, composed of about one hundred persons, who arrived in June, 1585, and returned to England in the June following: the other, near the mouth of James' river, and consisting of about the same number of settlers, who arrived in the year 1587, and continued there. In the title of the charter, it is said, that it shall continue

* Hazard's collection, 33. † Hazard's collection, 9, 14, 24.

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in force for six years, and no more; but in the body of if there is no limitation. In the year 1603,* however, it was forfeited by the attainder of Sir Walter Raleigh, for treason, and the right re-vested in the crown.

In the year 1606, James I. by his letters-patent, dated April 10,† gave permission to two companies, to form settlements on any part of the coast of North-America, between latitudes 34 and 45. These companies were denominated the first and second colonies of Virginia: The first was to make its settlement between 34 and 41 degrees of latitude, the second between 38 and 45°. Neither was to settle within two hundred miles of any place previously settled by the other. Each was to possess all the lands along the coast, fifty miles in both directions, from the place of its first settlement, one hundred miles back into the country, and all the islands within one hundred miles of the coast. A council was appointed for the government of each colony, and it was provided that all the lands contained within the above mentioned limits should, on petition to the crown, be granted to such persons as the respective councils should recommend.

It does not appear that any such grants were ever made; but James I. by letters-patent, dated May 23, 1609,‡ separated the first colony from the second, and, on the petition of the persons composing it, erected them, and a number of others into a corporation under the name of "The treasurer and company of adventurers and planters of the city of London, for the first colony of Virginia." All the lands along the coast, two hundred miles south, and an equal distance north of point Comfort, and extending west to the South-Sea, with the islands within one hundred miles of the coast, were granted to this company, commonly called the London company, and their successors, in fee simple; in trust, however, to be distributed among settlers: and the powers of government were vested in two councils, one in England, and one in America.

Point Comfort being about latitude 36, 30, the limits of this charter must have extended south to about la-

* State trials, vol. i. p. 186. † Hazard's col. 50. ‡ Ibid. 58.

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titude 38. It is not easy to determine whether the government erected by it, ought to be considered as royal or proprietary; but it has more the appearance of the former.

On the 12th of March, 1612,* James I. granted another charter to the London company, which confirms the former, and adds to their territories all the islands within 300 leagues of the lands formerly granted to them, and between the 30 and 41 degrees of latitude.

The company continued to exercise the powers of government, and dispose of the rights of soil, within the limits allotted to them, till about the year 1624, when the affairs of the colony appearing to be badly conducted, their charters were forfeited by quo warranto,† and the government, with all the rights of soil and jurisdiction taken into the hands of the crown. By this resumption Virginia became, if it were not so before, a royal government; and its boundaries became liable to abridgment or alteration at the pleasure of the monarch.

The rights of soil and jurisdiction in all the lands south of the Chesapeake, not actually appropriated being thus re-vested in the crown, king Charles I. made a grant to Sir Robert Heath, his attorney-general, extending from the 30 to the 36 degree of latitude north.‡ This grant was afterwards considered as void, but whether by surrender, non-user, or in what other manner, does not appear.

The next grant of this country was by Charles II. to Lord Clarendon and others, bearing date March 24, 1662. It included "all that territory or tract of ground situate, lying and being within his said majesty's dominions in America, extending from the north end of the island called Lucker island, which lyeth in the northern Virginian seas, and within six and thirty degrees of the northern latitude, and to the west as far as the South-Seas, and so, southerly, as far as the river St. Matthias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so within a direct line as far as the South-Seas

* Hazard's col. 72. † Ibid. 88. 89. ‡ Att. gen. report, 26.

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aforesaid." These grantees were afterwards called "Lords Proprietors," and the country contained within their boundaries was erected by their charter into a province, under the name of "Carolina." Extensive immunities were conferred on settlers, and the rights of soil and government, were vested in the proprietors in fee simple.

By another charter from Charles II. bearing date June 30, 1664, the former was confirmed, and its limits extended from latitude 36, 30, to latitude 29 inclusive, and from those points due west to the South-Sea.

On the 25th of July, 1726, the lords proprietors by deed duly executed, surrendered to the crown all their rights under these charters,† lord Carteret alone, one of the number, retained his share, and it was afterwards separately allotted to him in the northern parts of the province. The surrender was accepted and confirmed by act of parliament, and by virtue of it Carolina became a royal government. It was afterwards divided into two provinces, called North and South Carolina, by a line beginning at the north end of long Bay, and running thence north-west to the latitude 35, and thence due west to the South-Sea; lord Carteret, better known by the name of lord Grenville, had his part laid off in North Carolina.

George II. by letters patent, bearing date on the 9th of June, 1732,‡ erected lord Percival James Oglethorpe and others, into a corporation under the title of the "Trustees for establishing the colony of Georgia in America," and granted to them and their successors, in trust for future settlers, all those lands, countries and territories, situate, lying and being, in that part of South-Carolina in America, which lies from the northern stream of a river, there commonly called the Savannah, all along the sea-coast to the southward unto the most southern stream of a certain other great water or river called the Alatamaha, and westward from the heads of the said rivers, respectively, in direct lines to the South-Seas. This country was erected into a province called "Georgia," and power was given to

† Att gen. report, 47 † Ibid. 44. 72. ‡ Ibid. 91. 97.

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the trustees for twenty-one years to frame laws and regulations for its government; after which all the rights of soil and jurisdiction were to vest in the crown.

Under this charter Oglethorpe took possession of the country for the trustees and made several settlements: and in the year 1752, the trustees by deed duly executed, surrendered their charter to the crown.* Georgia from that time became a royal government.

By the treaty of Paris, in 1763, Spain ceded to Great-Britain, Florida, Pensacola, and, in general, all that she held in North-America east and south-east of the river Mississippi: and a line drawn down that river from its source to the sea, was established as the western boundary of the British dominions.†

Soon after this cession the British government, by a proclamation for the regulation of its colonies, bearing date October 7, 1763, erected Florida into two governments called East and West Florida. They were divided from each other by the Apalatchicola river; and the latter was bounded by the gulph of Mexico on the south, on the west by lakes Pontchartrain and Maurepas, and the river Mississippi, and on the north by a line drawn from that part of the river Mississippi which is intersected by latitude 31, due east to the Apalatchicola. The northern boundary of East Florida was a line drawn from the confluence of the Chatahocchee and Flint rivers, where they form the Apalatchicola, to the head of the St. Mary's, and down it to the sea.

Disputes in the mean time having arisen between the governments of South-Carolina and Georgia, about the lands, lying between the Alatamaha and St. Mary's, they were, by this proclamation, annexed to Georgia.‡ whose southern boundary, stretching only to the Alatamaha by its original charter, was thus extended to the river St. Mary's.

The proclamation also contains a clause, "Reserving under the sovereignty, protection and dominion of the crown, for the use of the Indians, all the land and territories not included within the limits of the

* Att. gen. report, 97. † See an extract from the treaty, appendix No. 1.
‡ See the proclamation, appendix No. 2.

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governments thereby erected, or within the limits of the territory granted to the Hudsons Bay company; *as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest,*" and it forbids "the governors of all the colonies to grant warrants of survey, or pass patents, for any lands beyond the heads of these rivers, till the further pleasure of the crown should be known.

When the first British governor took possesion of West-Florida, he found its limits to the north so contracted, as to cut him off from the most fertile and healthy lands and even to exclude from his province some very considerable settlements, which had been formed under it, and made part of it, while subject to the Spanish government. He made a representation of these circumstances to the crown.* It was referred to the board of trade and plantations, and by their advice the province was extended to the north, "By a line drawn from the month of the Yazoo river, where it unites with the Mississippi, due east to the Apalatchicola. This extension, which took place before the year 1770, was not made by proclamation, but by instructions, to the governors of that province, and their commissions.† They went on to exercise jurisdiction and grant lands in the country thus annexed to their government, till it was ceded to the United States by Great-Britain, at the peace of 1783.

When the British colonies, including South-Carolina and Georgia, dissolved their connection with the mother country in the year 1776, and erected themselves into independent states, they agreed that each should hold by its former limits; that each state should possess the same extent of territory that had belonged to it while a colony. This, indeed, was not readily consented to, for as the limits of several colonies, as Massachusetts, Connecticut, New-York, Pennsylvania, Virginia, North-Carolina South-Carolina, and Georgia, included a great extent of unsettled country,

* See proclamation, appendix No. 3. † See appendix No. 4. An extract from the instructions to governor Chester. It is not known that any copy of any other of these instructions or commission exist in America. See also Att. gen. report, 21.

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while others, as New-Hampshire, Rhode-Island, Jersey, Delaware, and Maryland, possessed little or none, the latter contended that these unsettled lands should be considered as a common property among all the states, and appropriated for their mutual benefit; and some of them, particularly Maryland, refused to accede to the union, until some of those states which possessed the most extensive limits, should relinquish a part of their claims for this purpose. This was at length done; Massachusetts, Connecticut, New-York, and Virginia, made relinquishments, retaining, however, very considerable portions of the land in question. The articles of confederation were then ratified, leaving all those states which had made no relinquishment, in the quiet possession of the whole territory comprised within their ancient limits. Of this number was Georgia; which was so far from relinquishing, that on February 7, 1783, she passed an act asserting that her jurisdiction and right of soil extended "over all the country between the Mississippi, the Atlantic, the sourthern boundary of the United States, as established by the treaty of peace, and the southern boundary of North-Carolina."

By another act, passed February 7, 1785, she proceeded to exercise the rights which she had thus asserted. It was thereby enacted "That all the country contained within a line to be drawn down the Mississippi, from where it receives the Yazoo, till it intersects the 31st degree of North latitude; then due east as far as the lands might be found to reach, which had at any time been relinquished by the Indians; then along the line of relinquishment to the river Yazoo, and down it to its mouth, should be erected into a county called Bourbon, and that when the land-office should be opened, all persons previously settled there should have the right of preemption at one fourth of a dollar per acre."

Under this act, commonly called the Bourbon county act, no settlements were ever made. The relinquishment of land, which is spoken of in it, took place at Mobile, in May, 1777, by virtue of a treaty between the Choctaw nation, to whom that country then be-

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longed, and the British superintendant of Indian affairs, and was confirmed by the treaty between those Indians and the United States, held at Hopewell, on the 3d of January, 1786. It extended from the mouth of the Yazoo 110 miles down the Mississippi; at the upper end it was 15, at the lower 60 miles broad.

About the same time a dispute arose between the states of South-Carolina and Georgia, respecting their boundaries. South-Carolina contended, that as the original boundaries of Georgia were the rivers Savannah and Alatahama, and lines drawn due west from their sources to the Mississippi, all the land lying south of the Alatamaha and of a line drawn due west from its source to the Mississippi, as far as to the northern boundary of the Floridas, continued to be a part of the province of South-Carolina, out of which Georgia was taken: and that when the British crown, by its proclamation of October 7, 1763, annexed to Georgia, "all the lands lying between the rivers Alatamaha and St. Mary's," it meant only the lands actually between those rivers below their sources, and not such as lay above those sources; and between lines drawn from them respectively west to the Mississippi; which tract of country, of course, even after the proclamation, still continued a part of South-Carolina. Georgia, on the contrary, maintained that when the proclamation annexed to its government "all the lands lying between the rivers Alatamaha and St. Mary's, it meant to include not merely, the tract of country, which lay between those rivers, below their sources, but also the whole territory held by the British crown between the northern boundaries of the Floridas, as established by the same proclamation, and the ancient southern line of Georgia. This dispute was referred to congress under the articles of confederation by a petition from South-Carolina.* A court was appointed, and a day fixed for a hearing between the two states. But they afterwards agreed to withdraw the petition and settle the matter by negociation.† Their commissioners met at Beaufort, in South-Carolina for this purpose;

* Journals of Con. vol. x. p. 190. † Jour. Con. Vol. xi. p. 218.

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and, on the 24th of April, 1787, agreed on a convention by which that state relinquished the claim. On the 29th of February, 1788, this convention was ratified by an act of the legislature. It had previously been laid before congress and filed among the official papers of the United States.*

On the 21st of December, 1789, the legislature of Georgia passed an act for selling all this country, from the mouth of Coles creek, which is a little above the Natches, to latitude 35, and from the Mississippi to the Donbigby. Two companies were to be the purchasers, one called the South-Carolina, the other the Virginia Yazoo company; and they were allowed a pre-emption of two years, on their making the stipulated payments, within which periods they were to receive grants. But a dispute having arisen between them and the state about the mode of payment, the pre-emption expired without payments, having actually been made, and no grants were passed.†

On the 7th of December, 1793, a representation was presented to the court of Spain on the part of our government, in which the dispute between us and that power, respecting boundary, was stated, and our claim supported. This representation insists on the latitude 31, as the southern boundary of *Georgia*, and rests our title to the disputed territory which lay above that latitude, entirely on the right of state.‡ Indeed it is of importance to remark here, that in the whole progress of this dispute, which being definitively settled by the late treaty between the United States and Spain, need not now be discussed, our government held up the right of the state of Georgia to the territory above latitude 31, as altogether indisputable, and made that right the sole foundation of its own pretensions.§

On the seventh of January, 1795, the legislature of Georgia passed an act for selling parts of the territory

*Vol. xii p. 130. See also appendix, No. 7. † See the act, appendix, No. 8.
‡ See appendix No. 9—an extract from the representation.
§ See appendix No. 10—An extract from the report of the Secretary of State to the President, which was the basis of the instructions to the commissioners at Madrid.

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on the Mississippi, above latitude 31, to several companies, one of which was called the Upper Mississippi, and another the Georgia company. These are the companies whose rights are the subject of the present investigation. The land allotted to the first was directed to be bounded by a line "Beginning at the Mississippi river, where the northern boundary line of this state, (Georgia,) strikes the same: thence along the said boundary line due east to the Tenessee river; thence along the said Tenessee river to the mouth of Bear Creek; thence up Bear Creek, to where the parrallel of latitude twenty-five British statute miles, south of the northern boundary aforesaid, strikes the same; thence along the said last mentioned parrallel of latitude, across Tombigby or Twenty Mile creek, due west to the Mississippi river; thence up the middle of the said river to the beginning." The boundaries of the Georgia company were a line, "beginning on the Mobile Bay, where the latitude 31 degrees north of the equator intersects the same, and running up the said Bay, to the mouth of the lake Tensaw; thence up the said lake Tensaw to the Alabama river, including Currys and all other islands therein; thence up the Alabama to the junction of the Coosa and Daufuske rivers; thence up the Coosa river, above the big shoals, to where it intersects the latitude 34 degrees north of the equator; thence a due west course to the Mississippi river; thence down the middle of the said river, to the latitude 32, 40;" "thence a due east course to the Donbigby, thence down the middle of the Donbigby to its junction with the Alabama; thence down the middle of the said river to Mobile Bay; and thence down the Mobile Bay to the place of beginning."

It was provided that the companies should each make a certain deposit of money, on account of the purchase money of the lands, in the treasury of the state; and that on their producing receipts from the treasurer for these deposits, the governor should give them grants, taking at the same time mortgages of the lands to secure the remaining payments, which were to be made on or before the first of November

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following. In case of failure in these payments, the mortgages were to be instantly foreclosed, the first payments to be forfeited, and the grants to become void. It was also provided "That the lands to be conveyed by virtue of the act should be free from taxation till the inhabitants of them should come to be represented in the legislature of the state.*

The deposits were made accordingly, and the grants passed in pursuance of the act. Before the first of November, the final payments were completed, and the mortgages taken up. The companies afterwards proceeded to sell parts of this land to various persons in New-York, Massachusetts, South-Carolina, and elsewhere, for valuable considerations.

It must be remarked that previous to this act, the various companies had made formal proposals to the legislature for the purchase of the lands; which were accepted, and a bill passed through both houses accordingly. But the governor, judging these terms not sufficiently advantageous to the state, refused his assent to the bill, and stated his objections at large. Another bill was immediately framed so as to obviate the most material of these objections. It was passed, and received his sanction.†

The whole sum of money paid into the treasury of Georgia, on account of these purchases, was five hundred thousand dollars. Of this sum one hundred thousand dollars were appropriated by laws of the state, distinct from the abovementioned act, and pursuant to those appropriations were actually expended in the course of the year 1795.‡

On the 13th of February, 1796, the repealing act was passed. This act, however, makes no mention of repealing that of January 7, 1795, but after stating various objections against it, declares that it was *originally void*, and directs such part of the money paid in under it as then remained in the treasury, to be refunded to the purchasers, provided they should apply for it in the course of eight months; otherwise to be

* See the act, Appendix No. 11. † See appendix No. 12. clause of the repealing act, which recites these facts. ‡ See appendix No. 13. Governor Matthew's communication to the legislature.

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forfeited to the state, and in the mean time to remain in the treasury at their risk and expense. No provsion is made for the reimbursement of that part which had been expended for the use of the state.* In this situation the affairs now remain.†

From this view of the subject it seems sufficiently clear that no part of this country, above a line drawn due east from the mouth of the Yazoo to the Apalatchicola, belonged to the United States, at the time of the sale. This, it is believed, will appear in a satisfactory manner, from an attentive examination of their claim, under all the points of view in which it seems capable of being presented.

There are but three foundations on which the claims of the United States, in this country can rest.

In the first place, it may be contended, that those clauses in the proclamation of 1763, by which the sale and settlement of land in the colonies were restricted to the heads of the rivers falling into the Atlantic, from the west and north-west, did in fact curtail the extent of the colonies, and reduce them from the Mississippi to a line drawn from north-east to south-west, through the heads of those rivers: and that this line having thus become their western boundary, all the lands beyond it must be considered as waste territories of the crown, not subject to any colonial jurisdiction; in which case they must have been vested in the United States by the cession from Great-Britain in the treaty of peace.

In order to decide how far this principle is well founded, it will be proper to advert to the words of the proclamation itself; to the manner in which the British government acted under it before the revolution, and to the construction which it has received from the several states, and the government of the United States, since they became independent.

From a careful review of the proclamation itself, and a comparison of the various parts with each other,

* See appendix No. 14. The repealing act. † The convention which met afterwards, for the purpose of revising the constitution of the state, was paid from this fund. This was a virtual, but complete confirmation of the contract, by the convention as far as it had power to confirm. See appendix No. 13. The governor's communication at the end.

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it seems evident that the clauses in question were intended, not as a restriction of the territorial limits of the colonies, but *an instruction to the governors respecting the time, place, and manner, of granting lands and making settlements.*

The proclamation appears to have had five objects in view. 1. To erect certain new governments composed of the territories which Great-Britain had recently acquired by her treaty of peace, with France and Spain. 2. To annex certain additional territories to some of the governments then existing. 3. To reward the land and naval forces of Britain, which had served in America during the war, by an allotment of land in the colonies. 4. To protect the Indians in the safe and quiet possession of such lands as it was thought proper to reserve for their use: and 5. To regulate trade between them and the colonists. There is no hint of an intention to restrict the limits of the colonies by a line drawn through the heads of the rivers, or in any other manner. Had that been the intention of the British government, it would probably have been expressly declared; it having always been its practice to make alterations in the boundaries of its provinces in a very express and solemn manner, and usually in consequence of representations from the board of trade and plantations. This was the case in the extension of Georgia to the river St. Mary's, by this very proclamation, and of West Florida, to the mouth of the Yazoo afterwards; both of which took place in consequence of recommendations from the board of trade.* It being intended also to extend the governments of Nova-Scotia, and Newfoundland, the extensions were made by this proclamation in the most express and formal manner. It does not, therefore, seem in the least degree probable, that so important a measure as the cutting off one half of all the colonies, those at least, which were royal governments, if intended, should have been left to mere implication; to expressions which even taken singly, may bear a very different import.

* See Att. Gen. report, 135. 138. and appendix No. 2 and 3.

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The clauses which contain these expressions, are confined to the fourth object of the proclamation, which they appear to have had solely in view, viz. "To protect the Indians, in the safe and quiet possession of such lands as it was thought proper to reserve for their use." They are introduced by a preamble, which states, "That it was just and reasonable, and essential to the interests and security of the British government and its colonies, that the several nations or tribes of Indians with whom it was connected, and who lived under its protection, should not be disturbed or molested in the possession of such parts of its dominions and territories, as not having been ceded to, or purchased by it, were reserved to them or any of them *as their hunting grounds.*" In order to prevent this disturbance and molestation, various measures are adopted. First, the governors of Quebec, East Florida, and West Florida, the three new governments, are forbidden to grant any warrants of survey, or patents for lands, beyond the bounds of their respective governments." Secondly, the governors of the other colonies are forbidden, "*For the present* and *until the further pleasure of the crown should be known*, to grant warrants of survey or pass patents for any lands *beyond the heads or sources of any of the rivers, which fall into the Atlantic ocean, from the west, or north-west*; or upon any lands, which not having been ceded to, or purchased by the crown, were reserved to the Indians or any of them. Thirdly, all the lands not included within the limits of the three new governments, or of the Hudsons Bay Company; and "all the lands and territories lying to the westward of the sources of the rivers, which fall into the sea from the west and north-west," were declared to be reserved, *for the present*, under the sovereignty, protection, and dominion of the crown, for the use of the Indians. And all persons were forbidden from making any purchases or settlements, or taking possession of any lands within those reservations. Fourthly, all persons, who, either wilfully or inadvertently, had seated themselves upon any of the land so reserved, or upon any land which, not having been ceded to, or purchased by the crown, were still

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reserved for the Indians, were ordered immediately to remove. And fifthly, it was provided that in future "no private person should presume to make any purchase from the Indians of any lands reserved to them *within those parts of the colonies where the crown had allowed settlement*, but that if the Indians should at any time be inclined to sell such lands, they should be purchased only for the crown and in its name, at some public meeting of the Indians held for that purpose, by the governor of the colony respectively within which they lay. And in case they should lie within the limits of any proprietaries, then conformable to such instructions as the crown or the proprietaries should give."

On these regulations it is observable, in the first place, that they are all parts of a system, the avowed object and scope of which was to protect the Indians, not to alter or abridge the limits of colonies. To this object all of them were important; nor was that which respected the lands west of the heads of the rivers less so than any of the others. As those lands lay at a great distance from the settled parts of the colonies, they were beyond the reach of protection from the colonial governments; and it was therefore important that they should, while reserved for the Indians, be taken under the immediate protection of the crown, which, possessing a military force upon the frontiers, could more readily and effectually repel those inroads and encroachments, which it was the object of this system to prevent. The land below the sources of the rivers on the contrary, being nearer to the seats of the colonial governments, might derive the necessary protection from that source.

As to the terms "sovereignty and dominion of the crown," which are applied to the lands above the heads of the rivers, they mean nothing; for all parts of the colonies were equally under the sovereignty and dominion of the crown, the proprietary governments excepted. Even they were so to many intents, and where they were exempted from sovereignty by their charters, it was not in the power of the crown to bring them under it again by a proclamation.

It is to be remarked, in the second place, that this

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"sovereignty, protection, and dominion" were only to be "for the present," and while the lands were "reserved for the use of the Indians." It was, therefore, a temporary regulation; not a permanent change in the limits of a province, and was to cease as soon as the Indian should think fit to relinquish the lands, and the crown to permit the settlement of them. They were then to be under the government of that colony within whose limits they lay; to form part of it as before.

The same remark is applicable to the prohibition against granting warrants or patents for lands above the heads of the rivers. It was only "for the present" that they were prohibited: which shows that the prohibition was a temporary regulation only, the lands still continuing a part of the colonies respectively to which they belonged before, and the governors of which, when the prohibition should be removed, would go on to grant the lands as formerly.

It is remarkable in the third place, that the proclamation speaks of "lands reserved for the Indians, within those parts of the colonies where the crown had thought proper to allow settlement," and those lands whenever the Indians should be disposed to sell them, were to be purchased by the governors in the name of the crown and for its use. Settlements were therefore permitted in parts of the colonies where the lands had been reserved for the Indians. This could apply only to lands below the heads of the rivers which had not been purchased or ceded: for above the heads of the rivers, settlement was absolutely prohibited; and it proves that "to reserve lands for the Indians," did not take them out of the limits of the colony. There were also *parts of the colonies* where settlement was forbidden. This could apply only to the lands above the heads of the rivers; for below them, settlement was permitted, provided the land was previously purchased from the Indians. Consequently the lands above the heads of the rivers, though reserved for the Indians under the special protection of the crown, and forbidden to be settled without its express license, were nevertheless considered as "parts of the colonies," within whose former limits they lay.

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The difference made by the proclamation between the lands above, and those below the heads of the rivers, seems to be this, that both continuing to be parts of the colonies, the latter might be settled whenever they could be purchased from the Indians conformably to the established regulations; whereas the former, however willing the Indians might be, could not be settled or purchased without the express permission of the crown: the reasons of which distinction have been hinted at above, and indeed are sufficiently obvious.

It is to be observed in the last place, that these provisions extend to all the colonies, both royal and proprietary: some of which last description, particularly Pennsylvania, possessed extensive territories beyond the heads of the rivers, which fall into the Atlantic from the west and north-west. Although the crown might, and frequently did, execute a general superintending power over the proprietary governments, as well as its other colonies, might regulate their trade, protect the Indians, and prescribe the manner in which lands should be purchased or settled; it certainly neither had, or, claimed a right to alter, much less curtail their limits. This is evident from the whole tenor of its conduct, repecting the colonies, as well as from the nature of the proprietary charters themselves; which being in the nature of grants invested the proprietors with the right of soil. This right the crown could no more take from them than it could deprive individuals of any other property which they possessed, and accordingly we have seen that it never meddled with the Virginia territory until the company's charter had been legally vacated by a quo warranto. Nor was it till after the council of Plymouth, the lords proprietors of Carolina, and the trustees of Georgia, had respectively surrendered their charters, that the crown proceeded to make any disposition of their territories. It can hardly be presumed that it would so suddenly have departed from its constant maxim of conduct, and from the known principles of its laws,

† See Hazard's collection, vol. 1. p. 390. also act, p. 11, 12, 13.

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as to attempt regulations by which the proprietary government of Pennsylvania would have been deprived at once of nearly half its territories. Yet this must have been the effect of the clauses in question, had they been considered as a restriction of limits, rather than temporary instructions to the governors.

It is moreover an invariable rule in the exposition of legal acts, that in case of ambiguity, any construction by which they can be rendered consistent with right is to be preferred. But to consider these clauses as a restriction of boundary, would render them directly repugnant to the plain and acknowledged rights of the proprietary governments. Whereas to regard them merely as instructions to the governors, respecting the time and manner of making settlements, will reconcile them equally to the rights of the proprietors and of the crown: and this is the intention with which the proclamation, considered in itself, and taken under all these points of view, appears to have been made.

The construction thus obviously deducible from the words and tenor of the instrument itself, is strongly supported by the conduct of the British government, before the revolution. It must here be repeated and constantly kept in view, that these provisions extended, not only to South-Carolina, and Georgia, but to all the colonies whose territories lay above and below the heads of the rivers, falling into the Atlantic from the west and north-west. Of this number, were New-York, Pennsylvania, Virginia, and North-Carolina; besides South-Carolina, and Georgia. It is perfectly well known that between the proclamation of 1763, and the revolution, at a time when the British government still subsisted in Virginia, she extended her settlements beyond the heads of the rivers, falling into the Atlantic. Many of the settlements of Holston, New-River, Greenbriar, and other waters falling into the Ohio, were of this description, and they were made not only with the permission, but under the authority, of the British government. It is not known at what time the grants of land were made, under which these settlements took place, but it is perfectly certain that the settlements themselves were always consider-

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ed, as well after the proclamation, as before, as being part of Virginia, and that the laws were administered in them, under the authority, and in the name of its colonial government. This, it is most evident, could not have been the case, had the proclamation of 1763, been considered as curtailing the colonies, and restricting them to a line drawn through the heads of the rivers. In that case these settlements, so far from going on, and increasing under the government of Virginia, must have been cut off from the colony; and the exercise of authority there by its governor, would have been regarded as an act of usurpation. But this we know was not the case. If Virginia was not curtailed, neither were the other colonies; for the clauses in question apply equally to them all. From whence it is most evident that the crown considered, and intended these clauses as no more than a temporary instruction to its governors about the time and manner of making settlements; the extent and boundaries of the colonies, when it should permit settlements, remaining still the same.

It is equally clear that the subject has always been viewed in the same light by the states themselves since the revolution, and by the government of the United States. Not to speak of Georgia, which, as we have already seen, passed an act in 1783, to declare and establish her territorial limits, it is well known, that South-Carolina granted large quantities of land through all the country, from the mountains to the Mississippi, which grants she afterwards vacated, not because she had no right to make them, but because the land had not been purchased from the Indians. She afterwards ceded her claim to the United-States. North-Carolina too opened a land-office in 1784, and granted several millions of acres between the Mississippi, and the heads of the rivers which fall into the Atlantic. She afterwards ceded the territory to the United States, subject to these grants; and subject to them it was accepted; nor has the validity of the grants, except so far as related to the possessory right of the Indians, ever been disputed. Indeed the whole state of Tennessee is held by this very tenure. Before the ces-

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sion this country was considered as part of North-Carolina, as such was governed, and as such had a representative in the Congress of the United States. In the same manner, Virginia sold the whole Kentucky country, and then erected it into a state; it having remained in the mean time, under her laws, and a part of her state for many years; many and extensive districts, which still constitute parts of Virginia, and as such send members to Congress, lie beyond the heads of the rivers which fall into the Atlantic. All these settlements, grants, and cessions, have proceeded upon the principle that the western limits of the colonies were not altered by the proclamation of 1763. Otherwise all the grants of North-Carolina in Tennessee, and of Virginia in Kentucky, would be illegal; and a very considerable part of the territory still claimed and possessed by the latter state, must be lopt off from her.

Until, therefore, it shall be shown that the clauses in question apply exclusively to South-Carolina, and Georgia, or that the same rules of construction which have been universally adopted and admitted, with respect to other states, ought not to apply to them likewise, it seems perfectly clear that whether we regard the proclamation of 1763 itself, the acts of the British government under it, or the construction which has been given to it by our own government since the revolution, it cannot be considered as having curtailed the western boundary of those states.

From whence it results that the United States can found no claim to the lands in question, on this proclamation.

Their claim, however, to these lands, or a part of them, is supported on another principle, which must be next examined. It is said, that although Carolina, originally extended as far south as Florida, yet when the proprietors surrendered their charter, and these territories became re-vested in the crown, the southern limits of that province were restricted by the establishment of Georgia: that the rivers Savannah, and Alatamaha, having been fixed as the limits of Georgia, all the lands south of it were cut off from the go-

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vernment of South-Carolina, and continued to be waste territories of the crown, till part of them were annexed to Georgia, by the proclamation of 1763: that this proclamation, however, extended only to the lands "between the Alatamaha, and the St. Mary's," could not include the territory which lay above the heads of those rivers; and that the territory, therefore, continued to be waste land, not annexed to any government, nor part of any colony, till the treaty of peace, by which it was vested in the United States. By this pretension, if established, they would gain all the country, bounded by the Floridas, the Mississippi, and a line drawn from the head of the St. Mary's, to that of the Alatamaha, and from thence due west to the Mississippi.

Nothing can be more uncertain than the latitude of this last line. If the position of the sources of the Alatamaha were known, which is very far from being the case, it would still be very difficult to ascertain what ought to be considered as the head of the river: whether the place where it takes the name of the Alatamaha, its highest source from the sea, or its most southern source, be intended by the charter, as the place from where the west line is to be drawn. It has been thought, that the most southern source has been meant; but this is far from being fully justified by the words of the charter, which evidently refer to the most southern *mouth* of the river; it being known to enter the sea by several channels. The words are, "From the most northern stream of a river, there commonly called the Savannah, all along the sea coast, to the southward, to the most southern stream of a certain other great water or river, called the Alatamaha, and westward, from the heads of the said rivers respectively, to the South-Sea." It seems probable, however, that the *highest source from the sea*, was the point from whence the west line was intended to be drawn: and though this source will remain for a long time uncertain, even should the claim be established, yet it may be affirmed, not to lie so far north as to affect the purchase of the upper Mississippi company, whose most

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southern extent is no more than twenty-five miles south of the north boundary of Georgia.

The claim, however, would certainly include a great, perhaps far the greater part of the Georgia company's purchase.

This claim rests on two questions. 1. Whether the lands south of Georgia, continued to be a part of South-Carolina, after the former colony was erected? 2. Whether the whole of them were annexed to Georgia, by the proclamation of 1763, or that part only which lay below the heads of the Alatamaha, and St. Mary's. If they continued to be a part of South-Carolina, the cession of that state, by the convention of Beaufort, vested in Georgia, such parts of them as were not affected by the proclamation of 1763. If they were all affected by that proclamation, then the right of Georgia was complete independantly of the cession from South-Carolina.

As to the first point, it is to be regretted that more satisfactory documents for the investigation of it, cannot be resorted to. The papers most likely to decide it with absolute certainty, are the commissions and instructions, given to the governors of South-Carolina, between the years 1732, when the colony of Georgia was erected, and 1763, the date of the proclamation. Those documents, no doubt, exist in the office of trade and plantations in London. An official inquiry was made from a gentleman having access to the records of that office, and he furnished some extracts and copies; but others of a very important nature were omitted. From such documents, however, as can be recurred to, the following points seem to be satisfactorily established.

First, that after the surrender of their charter by the Lords Proprietors, the jurisdiction of the Royal governors of South-Carolina extended over the whole country which had been included in that charter.

It appears by a representation from the board of trade and plantations, to the king, on the 1st of December, 1727, that a fort was at that time kept up on the Alatamaha river, under the government of South-Carolina, and had been for some years; and the con-

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tinuation of it under the same authority is advised.* And on the 10th of June, 1730, the governor of South-Carolina was instructed to lay out townships and grant lands on the Alatamaha.†

Secondly, that when the colony of Georgia was erected, the country of which it was composed was considered by the British government as part of South-Carolina.

Lord Percival, Oglethorpe and others, who first projected the Georgia scheme, petitioned the crown for a grant of land *in South-Carolina*, for that purpose.‡ In the reports of the board of trade on this petition, Georgia is called "the colony to be established in South-Carolina."‖ After the establishment of the colony, the command of its militia was to *remain* with the governor of South-Carolina.§ Even in the charter, the lands to be included are described as "lying and being in that part of South-Carolina, in America, which lies," &c.** Lord Granville's part of South-Carolina not having, at that time, been separately allotted to him, his right in this country as one of the proprietors, was admitted still to exist; and, accordingly, the charter granted only seven-eighths of the land to the trustees,†† to whom Lord Granville afterwards conveyed his eighth. And in an instruction to the governor of South-Carolina, of a date subsequent to the charter, Georgia is mentioned as "a colony settled within the bounds the province of South-Carolina," and the governor of that province is instructed to register the charter among its records.‡‡

Thirdly, that after the establishment of Georgia, the lands south of its southern boundary still remained, and were considered by the crown as being under the jurisdiction of South-Carolina, and of consequence a part of that province.

It appears by a representation from the governor of Georgia, dated October 17th, 1761, that there was then, and long had been a military post kept on Cumberland Island, far south of the Alatamaha, "under

* Att. gen. rep. p. 80. † Ibid. 79. ‡ Ibid. 84. ‖ Ibid. 87.
§ Ibid. 91. ** Ibid. 91. †† Ibid. 100. ‡‡ Ibid. 95

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the direction and authority of the governor of South-Carolina."* The governor of South-Carolina too, in a letter to the board of trade, dated August 17th, 1763, affirms, that there was then, and had been for many years, a post to the southward of the Alatahama, garrisoned by detachments, from the province.† But this point is more strongly confirmed by the proceedings which took place, with respect to certain lands lying south of the Alatahama, and granted by the governor of South-Carolina, in the year 1762. These grants being complained of by the governor of Georgia, the board of trade and plantations reproved the governor of South-Carolina for making them; not on the ground of his possessing no jurisdiction, but because "the making of grants for lands in that country, was contrary to the intentions of the crown, and might not only embarrass the execution of those arrangements, which would probably become necessary from the cession of Florida, but interfere also with the measures about to be taken for the extension of Georgia."‡ The governor justified his conduct by alledging that his province still extended as far south as the limits fixed by the charter of Carolina to the lords proprietors, except as to such land as had been expressly included within the charter of Georgia.§ In a subsequent representation from the board of trade, to the crown, they seem to admit that these grants were made, "conformably to the governor's instructions."‖ And they expressly recommend that an act of the Georgia legislature, passed after that province had been extended to the St. Mary's, and tending to subject the grantees of those lands to improper conditions, should not receive the royal assent.** Transcripts of those grants were afterwards ordered by the crown to be registered in Georgia.†† And the grants themselves, thus virtually confirmed, have ever since been, and still are, considered as valid.

All these proceedings must have been founded on the principle that the lands south of the southern

* Att. gen. rep. 111 † Ibid. 118. ‡ Ibid. 115. § Ibid. 117.
‖ Ibid. 144. ** Ibid. 141 †† Ibid. 154

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boundary of Georgia, as first established by its charter, continued to be a part of South-Carolina, till the proclamation of 1763, annexed them, or part of them, at least, to the former province.

How indeed could they cease to be so? nothing is more clear than that all this country was included within the province of South-Carolina, at and before the establishment of Georgia. This has been abundantly proved.* But the charter of Georgia could affect those lands only which were included within its limits: nor was that province ever understood, either by its own governors or the crown, to extend further. All the rest of the country, of course, remained as it was before, until a further disposition of it was made by some new act of the crown. It is not pretended that any such acts took place till the proclamation of 1763.† The circumstance of this country being separated from the rest of Carolina by the intervening province of Georgia, does not alter the case: for it is by no means necessary, nor does it always happen, that all the territories of a government should lie adjoining. The province of Maine, we know, under the royal government was, and at this day continues to be, a part of Massachusetts, though New-Hampshire lies between them; and Connecticut by virtue of her charter, which extended west to the Mississippi, claims and actually holds lands on lake Erie, notwithstanding that New-York, New-Jersey, and Pennsylvania intervene.

There are, however, two passages which might seem, at first view, to contradict this opinion; but it is believed that on examination they will appear in a different light.

In a report to the crown by the board of trade and plantations, on which the proclamation of 1763 was founded, it is stated, "that a large tract of land, lying between the north boundary of East Florida, and the river Alatamaha, *which had hitherto been unoccupied*

* Sapaa. p. 55, 56, 57. 135. 140. ‡ Ibid. 18. 117.

† See Att. gen. rep. 111. 105. 115.

as to any permanent settlement, remained to be put under the proper establishment."*

On this passage, it is to be observed, that *occupation* and *right* are distinct things; so that the circumstance of this country's not having been occupied by South-Carolina, would by no means prove that it was not under the jurisdiction, and did not form part of that province. It is not said, moreover, that this country had not been occupied at all; that would have been contrary to the fact; for as we have seen, a post had been kept up in it, and garrisoned from South-Carolina; but that it had not been occupied *as to permanent settlement*. But it is a well known principle of law, that a legal possession, where necessary, may be maintained without a permanent settlement. Had actual possession in this case, been necessary, which may well be doubted, the continued occupation by a military post, would have been sufficient.

The board of trade is said to have laid the above-mentioned grants before the crown lawyers, for an opinion on their validity, and to have alleged at the same time, "that the province of South-Carolina did not appear, at any time either when under the government of the proprietors, or since it had been in the hands of the crown, to have exercised any jurisdiction in the country, south of the Alatamaha, or taken any possession of it."†

It is to be remarked in the first place, that the crown lawyers did not give an opinion, at least not an unfavourable one, on the subject of these grants: from whence it may be inferred, that after an examination of the subject they did not concur in the objections of the board. Secondly, that the assertion of the board, even if true, amounts to nothing; the right to possess, and the exercise of that right, being things altogether distinct. And thirdly, that the assertion is not true; it being evident from the documents already adduced, that the province of South-Carolina, had always maintained possession of that country, at least till the year 1762, by a military post.

* Att. gen. rep. 135. † Ibid 20.

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It seems, therefore, clearly to result from all these considerations, that the country south of the Alatamaha, not only was part of South-Carolina, previously to the establishment of Georgia, but continued to be so afterwards, until the proclamation of 1763. The facts stated, indeed relate wholly to the country, near the sea-cost, because that alone having been settled by the English, or even known to them, the interior parts were never expressly contemplated by the acts of their government. But the principles, on which those acts were founded, apply equally to every part of the territory, south of the ancient southern boundary of Georgia. South-Carolina could claim near the coast, in virtue only of her charter, and that charter gave an equal claim to all the land contained within its limits, and not included in those of Georgia. The right, therefore, which she possessed on the shores of the Atlantic before the year 1763, extended equally to the banks of the Mississippi, and by her cession at Beaufort, in 1788, was completely vested in the state of Georgia.

As to the second point, whether the proclamation of 1763, annexed to Georgia all the land lying between her ancient southern boundary, and the northern limits of the Floridas, or such part only as actually lay between the Alatamaha and St. Mary's, below their sources? the decision of it, if now necessary, might be attended with some difficulty.* The words of the proclamation are "we have also, with the advice of our privy council aforesaid, annexed to our province of Georgia all the lands lying between the rivers Alatamaha and St. Mary's."† Nothing else is said on the subject. From these expressions, and some others used by the board of trade and plantations in different communications‡ to the crown on this matter, it would seem that those lands only, which lay below the heads of the rivers, were contemplated. But this point seems to have been decided, as far as relates to the United States, by the government itself. In a

* This point was settled by the British government in one of its commissions to a governor of Georgia, which is annexed at the end.

† Att. gen. rep. 38. ‡ Ibid. 135. 140.

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report from the secretary of state, intended as the basis of instructions to our commissioners for treating with Spain, the latitude 31, is insisted on as the southern boundary of Georgia "established between that province and Florida by the proclamation of 1763."* And in the representation made by our commissioners, December 17th, 1793, the same thing is repeated and urged to the court of Spain as the foundation of our right.† It might perhaps be thought doubtful how far these declarations would preclude the government in a court of law; but we can hardly suppose that it would contend for a principle formally and expressly contradicted by its own solemn acts; which it must do were it to urge a claim against the state of Georgia for any of these lands, founded on a supposition that the whole of them, down to the Mississippi and the latitude 31, were not annexed to that state by the proclamation in question.

The third, and only remaining ground on which the United States can rest their claim to a part of this territory, is the extension of West Florida after the year 1763.

It is contended that the British crown having previously to the year 1770, and while all the colonies were subject to its dominion, extended West Florida up to the mouth of the Yazoo and a line drawn due left from thence to the Apilachicola, by instructions and commissions to its governors, all the country between that line and the latitude 31, ceasing to belong either to South-Carolina or Georgia, became a part of West Florida, and being thus placed without the jurisdiction of any state in the union, was ceded, by the treaty of peace, to the United States.

Nothing can be more certain than the principle that all the lands ceded by Great-Britain in the treaty of peace, and not included within the limits of any state,

* Appendix, No. 9. An extract from the representation.

† The same principle is repeated, and urged on the court of Spain, by Mr. Pinckney, the American minister for negociating the late treaty with that power, so lately as August 10th, 1795, several months after the sales in question had been formally notified to the government. See app. No. 16. An extract from Mr. Pinckney's representation, of Aug. 10th, 1795, to the Spanish court.

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became vested in the United States. Nor can there be any doubt that as both Carolina and Georgia were royal governments in the year 1770, the crown had a right at that time to alter, abridge, or extend their limits at its pleasure; to take parts of their territories and annex them to old governments or erect them into new ones. It was by this exercise of this right that after Virginia became a royal government in 1624,* parts of its territory, all south of the latitude 36. 30. were included in the grant of Carolina: that after the surrender by the lords proprietors, Carolina itself was divided into two governments, and Georgia carved out of one of them; and that the country south of the first boundary, established for Georgia, was afterwards annexed to that province.

As to the mode of exercising this right there may be more room for doubt. It may be said that when the limits of a province had been fixed by a proclamation or charter, which are public and solemn acts, they ought not to be altered, and could not legally, by acts of *a less solemn* nature; such as commissions or instructions. But this objection does not seem to have any weight; because though commissions and instructions, especially the former, were not published in the same manner with proclamations, they were nevertheless published, and with circumstances of sufficient notoriety; being entered on record not only in the office of trade and plantations, but also in the provinces; where they were moreover publicly read. They received indeed a greater degree of publicity than charters, which were recorded only, without being promulgated in any manner. As to authenticity, these commissions were acts of the king in council, under the great seal as well as proclamations or letters-patent, and, therefore, of equal authority. As the crown, besides, possessed the right of altering boundaries it might certainly exercise that right in whatever manner it thought fit: and indeed the extent of the royal colonies depended, in many instances, on the commissions to governors, and was regulated by them.

* Supra, p. 9, 10.

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Of this Virginia, Carolina and Georgia, are examples; which after they became royal governments, were continued according to their ancient limits, not by new letters-patent, but merely by the commissions to their respective governors.

It, therefore, seems undeniable, that by this extension of Florida, the territory which it affected was entirely cut off from Georgia, or South-Carolina, to which ever of them it belonged, and rendered completely a part of Florida; from which it necessarily follows that this territory was ceded by the treaty of peace to the United States, not to Georgia, and vested in them.

As the mouth of the Yazoo, however, lies in latitude 32. 30.* or thereabouts, it is clear that this claim of the United States does not affect the upper Mississippi company's purchase, which cannot extend further south than latitude 34. "30." But a very considerable part of the Georgia company's purchase, will lie below a line to be drawn due east from the mouth of the Yazoo. Its southern boundary between the Mississippi and Donbigby, is higher up than that line; namely, in latitude 32. 40. but between the Donbigby and Alabama, it extends down nearly to latitude 31. In this quarter, consequently, a great part of its lands are included in the claim of the United States.

How far is this claim still valid against the company? Admitting that these lands belonged to the United States at the time of the sale, was it attended or preceded by any conduct on their part which will render it valid against them in the eye of the law? This was the second point proposed for examination.

On this point two questions arise which ought to be distinctly considered; first, whether the conduct of the United States respecting this territory at the sale, and previous to it, was such as, if pursued by an individual under similar circumstances, would have rendered the sale binding on him? And, secondly, whether the same principles will apply to the government?

* See the appendix, No. 6. An extract from the representation of Purcell, who surveyed that country, under the authority of the British government.

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As to the first, there is no rule better established in the courts of equity than this, that whoever, knowingly and without restraint, acquiesces in a disposition of his property, for a valuable consideration, by a person who pretended and appeared to have the right, shall be bound by the disposition: it being a maxim of law, "That silence implies content; and that he who does not forbid an act when he has a right and an opportunity to do so, orders it."* This rule has been long admitted in the courts of equity, and is abundantly supported by the authorities at the bottom.†

But he must acquiesce "knowingly," that is, he must understand the nature of the act about to be done; for he is bound on the principle of having assented; and a person cannot assent to what he did not know. He must also acquiesce "without constraint," for there can be no assent where there is not freedom.

And the person who makes the disposition, must not only claim a right, but appear to possess it; for whoever should make a purchase from one who neither claimed, nor appeared to possess a right to sell, could blame none but himself, and must sustain the loss as a punishment for his own folly.

But if the owner should not only acquiesce in the sale, but give colour by his conduct to the right of the seller, and in that or any other manner encourage the purchaser to buy, he will by a stronger reason, be bound to confirm the sale.‡ This principle is also fully established by the authorities already cited.

Let these rules be applied to the acts of the state of Georgia, and the conduct of the United States respecting this territory, previously to the sale in question. It will appear that the latter not only acquiesced, but encouraged: that they not only saw in silence all the acts of ownership exercised by Georgia over this land,

* 1 Equi. ca. abr. 357. Case of Hanning v. Ferrers.

† Hudsden v. Cheney, 2 Vern. 150.—Raw v. Pole, 2 Vern. 239.—Ibbotson v. Rhodes, 2 Vern. 554.—Berrisford v. Milward.—Barnard, Chan. 101, 102.—Peter v. Russel, 2 Vern. 726.—Hobbs v. Norton, 1 Equi. ca. 356. Hanning v. Ferrers, 1 Equi. ca. 357.—Arnot v. Biscse, 1 Vezey, 96.—Clare v. Earl of Bedford, cited by Lord Hardwicke in Arnot v. Biscse.—Welford v. Beezley, 1 Vezey, 6.—Mocatta v. Murgatroyd, 1 P. W. 393.—Head v. Egerton, 3 P. W. 280.

‡ See the cases cited above.

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all her acts preparatory to the sale, and the sale itself, but by their own proceedings gave colour and sanction to her title.

As early as the year 1783, Georgia began to assert her claim to these lands. In that year she passed an act declaring them to lie within her charter limits, and holding out encouragement to persons to settle on them.* To this proceeding the United States made no objection.

In 1785, knowing that the Indian claims had been extinguished in a tract of land on the Mississippi, below the mouth of the Yazoo, and believing that extinguishment, as it was within the limits she claimed, to have enured to her benefit, she erected that tract into a county, and offered new encouragement to settlers. She, moreover, at the same time, declared her intention of opening a land office for the sale of the lands.† To this proceeding the United States made no objection.

Sometime afterwards a dispute arose between the two states, South-Carolina and Georgia, about this territory, and it was referred to congress; which thus received express notice of the claims of these states, but made no objection to them, alledged no right in itself. This dispute was afterwards settled, and South-Carolina ceded her claims to Georgia. The act of cession was communicated to congress; and congress made no objection;‡ so far indeed was she from objecting, that on the 20th of October, 1787, after this cession had been communicated to her, she made a public and formal requisition on the state of Georgia, for a cession of her territory.§ This act, done under a complete knowledge of all the circumstances, was a very strong recognition of the right of that state.

In 1789, Georgia passed an act for the sale of these lands to certain companies; one of the companies attempted a settlement, and sent an agent; all this was known to the government of the United States, which issued a proclamation against certain acts of

* See the act, p. 19. † Ibid. p. 19, 20. ‡ See ante. p. 366. § Ibid. p. 366. See also the president's proclamation against James O'Fallon, in 1795.

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the agent, but said not a word against the sale, or about any right of the United States to the land.*

Two years after this the government of the United States, being engaged in a dispute with Spain about this country, expressly declared, in an official representation, that it belonged to Georgia by virtue of her charters, and the proclamation of 1763, and rested their claim to it as part of their territories, entirely on her title.

What higher sanction to a title could an individual or a government hold out? What stronger acknowledgment than this long acquiescence, followed by this express declaration, when the subject had been so often discussed, the claim so often renewed? The government not only suffer Georgia repeatedly to say, "this is my land," without contradicting her; to sell it once without interposing; but, not content with this tacit acquiescence, joins in the assertion, and says in a solemn act, "this is the land of Georgia." The question may be repeated, what stronger encouragement can be given to purchasers?

Even after the last sale had been made, of which the government was formally notified by the governor of Georgia, no sufficient steps were taken to warn the purchasers of their danger, and prevent them from completing the payment. When the government received this notice, only fifty thousand dollars out of five hundred thousand had been paid. The rest was not due till some months after. Even then the government set up no claim, made no interference. It merely held up the idea that it might possibly possess a right, by directing its law officers to institute an inquiry into the title of Georgia. Even this idea they did not plainly intimate, much less expressly declare. Their resolution directs the attorney-general "to collect, digest, and report *to the next congress*, the charters, treaties, and other documents relative to, and explanatory of the title to the lands situate in the southwestern parts of the United States, and claimed by certain companies under a law of the state of Georgia." How was

* See Journ. of Congress, vol. 13. p. 210. And appendix, No. II, the resolution itself.

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it to be understood from this proceeding that the government claimed the land! with what justice could purchasers, who contracted under the strong previous assurances, which have been stated, and after this last transaction paid the money, be called upon for the purchased property, by that very party which had thus led them into the contract?

But was the government apprized of their right? Was it unknown to the purchasers themselves? These two questions deserve to be considered.

As to the first, it is to be observed, that every person is presumed in law to be acquainted with his own rights. This principle is founded on the best reasons. If a person, having a right to land, should stand silently by, and see it sold, and then be permitted to reclaim it, under pretence that he was ignorant of his title, a pretence which it would frequently be impossible to disprove, the greatest frauds might be committed. It would, therefore, be presumed by the courts that he knew his own title, unless he gave very good proof to the contrary, and he would be bound by the sale. Most of the decisions, indeed, have been in cases where the party was expressly stated to have been acquainted with his own title; but there are some where this does not appear; and in one,* the owner, who was a woman, declared, on oath, that she was ignorant of her right; yet, as she was present at the sale, and did not object, she was decreed to be bound. This must have been on the principle that every one is presumed to understand his own rights.

This principle, however, could apply only in cases where the party had a reasonable opportunity of knowing them; for if he were in circumstances which rendered that knowledge impossible, he could not, on any principle of justice, be considered as having consented to their alienation. In the abovementioned case the woman, though ignorant of her title, was in a situation which enabled her to become acquainted with it by proper attention and inquiry.† And the United

* See Hudsden v. Cheney, 2 Vern. 150.
† See also the case of Hobbs v. Norton, 1 Equi. Ca. Abr. 356.

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States also might easily have acquired the most complete knowledge of their claim to the land in question.

In cases, moreover, of mere silent acquiesench, a party might, perhaps, be allowed to disprove his own knowledge. Even this would be very doubtful. But where he had given positive and express confirmation to the right of the seller, and had thus encouraged the purchaser to buy, he could never be allowed to claim the property in contradiction to his own declarations. Silence about his right might be occasioned, and therefore, perhaps, excused by ignorance of it; but that ignorance could never be a sufficient inducement or a justification, for his declaring the right to be in another. If he chose ignorantly to make such a declaration, he himself, not the innocent purchaser, must abide the consequence.* In this predicament is the government of the United States; which, not content with silently acquiescing in the acts of Georgia, has made the strongest declarations in favour of her right.

And, lastly, there is good reason to believe that the government was actually apprized of its right to this land. The extension of Florida took place in 1770. In 1777, the Indian claims in the Natches district, which lies within the limits of this extension, were extinguished by the British government. At the treaty held at Hopewell, in 1786, between the United States and the Chacktaws, the former, in order to preclude the Indians from the Natches district, availed themselves of this extinguishment: and as, for obvious reasons, they could not have supposed it to have been made for the benefit of any other government than Florida, Georgia having then declared itself independent, it was notice to them that the British had extended the jurisdiction of that province. Their claim is founded on this extension; of which if they did not in this manner receive complete notice, they had such intimation at least, as not only made it incumbent on them to inquire fully into the business,† but pointed

* See the above acted case of Hobbs v. Norton.
† See the case of Hobbs and Norton.

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out the source from whence all necessary information might be drawn.

But it may be asked if the government was apprized of these circumstances, why did it omit to urge them in its negotiations with Spain? The reason is obvious. To have urged them, would have defeated its own claim. It could claim this country, as part of the United States, on the ground only, that it was not a part of Florida. To have shown that it had become a part of that province before the treaty of peace, would have established the claim of Spain; for Florida was ceded to her previously to the definitive treaty between Great Britain and us; and it is on the definitive treaty that our claim rested. It was the business of our government, therefore, to keep this matter out of view; and fortunately for us, it seems to have been unknown to the Spaniards. Certainly it was much wiser to retain this country, as part of the United States, even at the expence of giving it to Georgia, than to yield it to Spain. If our government chose to pursue that course, and by its conduct and assertions, individuals have been induced, confiding in its authority, to regard Georgia, as the owner of these lands, and to purchase from her, with what justice could the United States now attempt to deprive them of the property? Is government, contrary to every rule of law, to take advantage of its own acts, in order to injure others, and to punish them for having confided in its solemn declarations?

But, were not the purchasers themselves acquainted with this right, or at least bound to take notice of it? And in that case, did they not purchase at their own risk? The answer to this, also is obvious. Had the United States been acquiescent, had they remained silent and passive only, the purchasers might have been considered, perhaps, as taking at their own risk: but when Georgia openly claimed and exercised the right, and the United States, not only made no objection, but aided the claim, by their positive declarations, the purchasers were bound to look no further. Even had the claim of the government been matter of record,*

* See the case of Arnot v. Biscoe, 1. Vez. 96.

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or had they been expressly informed of its existence,* yet would their purchase have been valid under these circumstances of encouragement, by the government itself.

It seems clear, therefore, that as the party selling, not only claimed the right, but had the appearance of possessing it, which appearance was confirmed by the acquiescence, and even the express declaration of the true owners: this sale in the case of an individual, would be completely valid and binding in law.

But will the same rules apply to a government? This is the point next to be examined.

In the English law, from which most of our maxims of jurisprudence are derived, it is a received principle, that the king, who represents the government, and in whom the public property is legally vested, can be made amenable to no kind of process; that to him no fraud, no impropriety, no negligence even, can be imputed. Yet if he should do a wrongful act, as making an improper grant, for instance, the court of Chancery would give redress to the party injured, and even set aside the grant, if necessary, on the ground that the king had been deceived. This proves two things; first, that the acts of government are subject to the rules of law and justice, although the government itself cannot be brought to answer in a legal process: And secondly, that the inability of the government to do wrong, is a mere fiction, which the judicial power explains away in favour of justice, whenever it can. They will not say, that the act was done through negligence, or an improper intention, but through deception; yet, if in fact wrongful, they will set it aside whenever it is of such a nature, as to be subjected to their control.

This being the case, even in England, whose monarchical government, is supposed to require a sacred inviolability in the chief magistrate, the same maxims should obtain more readily and in greater extent among us, as being far more congenial to the nature and principles of our government. Accordingly we

* Case of Hobbs v. Norton, ante.

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find that the idea of subjecting the acts of government to the rules of judicial decision, is perfectly familiar in our constitutions. Our courts make no difficulty of declaring Legislative acts void, even those of the Union, where they are contrary to the constitution. This is founded on the principle that the legislatures in making such acts, have exceeded their authority. Why should not the acts of government in other instances also, be subjected to the rules of law and the maxims of justice? Why should not this salutary control of the judicial power, be extended to all cases where the acts complained of can be brought within its reach? There seems to exist no good reason to the contrary. Our government possesses land, which it is in the practice of selling to individuals; and it appoints agents for that purpose, with proper powers and instructions. If after one of these agents had made a sale pursuant to his powers, the government should attempt to reclaim the land, or sell it again, would not the judicial power protect the title of the first purchaser? Would it not inquire into the validity of the second sale, whenever it became the subject of litigation, and declare it void, even if made by an express law? There seems no doubt on this head. If then, the judicial power would enforce the rules of law and justice, as to one mode of disposing of property by the government, why should it not equally enforce them, as to other modes? And we know, that a person may as effectually dispose of his land by standing by, while another sells it, as by selling it himself.

Upon the whole, there does not seem to be any reason why the same rules which have been established on this subject, respecting individuals, should not equally apply to the acts of government. From whence it would result, that the United States, having not only acquiesced in all the acts of ownership exercised by the state of Georgia, over this land, and in the ultimate sale of it, but also supported and given colour to the right of that state by express declarations in its favour, will be bound by the sale. This opinion, however, cannot be positively pronounced. The matter is attended by many difficulties; and the

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decision, in some of its important parts, rests not on authority, but on reasonings, the force of which must be judged of in the courts. There, perhaps, a very different view of the subject may be entertained.

The claims of the United States, which opened the first, and far the most extensive field of inquiry, having been thus surveyed, the repealing act of Georgia, now presents itself for consideration.

This act, it is to be observed, in the first place, does not profess to *repeal* the act of January 7th, 1795, but declares it void. The reasons for this mode of proceeding, are obvious. The act of January 7th, had produced its whole effect. The sales which it directed, had been completely made, the money paid, and grants passed. It could not, therefore, have been at all affected by a repeal; for it is a well known principle, that to repeal a law, far from undoing what has already been done under it, can only prevent its future operation. In order to destroy these sales, therefore, which was the object aimed at by the legislature, it was necessary to do something more than repeal the law: it was necessary to declare it originally void.

A single observation, which presents itself here, might decide the question on this repealing law. It is this; that the force, validity, or meaning of a legislative act, is purely a judicial question, and altogether beyond the province of the legislature. It is the province of the legislative power to make laws, to give them their existence; but to expound and enforce them, belongs to the judiciary. The judicial power is to declare, what the *law is*; the legislative, what it *shall be*. The legislature, therefore, may repeal one of its own acts; that is, may declare, that it shall not hereafter be law: but should it go further, and declare that it is void, that it is not now law, it steps beyond its powers, and its proceedings become null.

This is a fundamental principle of all our constitutions which declare, that the judicial and legislative powers shall be distinct and separate. It results also from the very existence of a written constitution; which, by its necessary operation, prescribes limits to the legislative body, and confides the protection and

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maintenance of those limits, to the judicial power. As well might the legislature try causes, or hear appeals, as attempt to expound, enforce, or declare void, one of its own acts; except so far as might relate to the *future* operation of such act. Its validity, so far as might relate to its former operation, to acts already done under its authority, is a question which the courts of justice alone, not the legislature, are competent to decide.

These sales moreover were contracts, made with the utmost solemnity, for a valuable consideration, and carried deliberately into complete execution. It is an invariable maxim of law, and of natural justice, that one of the parties to a contract, cannot by his own act, exempt himself, from its obligation. A contrary principle would break down all the ramparts of right, dissolve the bonds of property, and render good faith, to enforce the observance of which, is the great object of civil institutions, subservient to the partiality, the selfishness, and the unjust caprices of every individual. There is no reason why governments, more than private persons, should be exempt from the operation of this maxim; nor are they considered as exempt by our constitution or our laws. The state of Georgia, being a party to this contract, could no more relieve itself from the obligation, by any act of its own, than an individual, who had signed a bond, could relieve himself from the necessity of payment. If there were sufficient grounds for relief in either case, the state, or the individual must resort to the courts of justice, where it would be afforded: but the acts of the one, and the other, for relieving themselves, would be equally and essentially nugatory.

The act of Georgia, therefore, can have no legal effect.* It can be regarded only as a declaration, stating the grounds on which that state conceives itself entitled to relief, from the contract in question. As such a declaration however, from so respectable a body as the legislature of a state, cannot fail to make

* It is satisfactory to find this opinion corroborated by that of a very eminent lawyer in New-York who was sometime ago consulted on this point—See Col. Hamilton's opinion; appendix No. 17.

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a strong impression, it will not be improper to examine these grounds a little more minutely, in order that a better judgement may be formed about their sufficiency.

The sales are declared void by this act, on two grounds. First, that the legislature had not constitutional power to make them. Secondly, that in passing the act for that purpose, it was influenced by fraudulent and corrupt motives.

As to the first, it is not improper to repeat that it is purely an object of judicial inquiry. Had the state of Georgia, as it might have done, filed a bill in the supreme federal court, against the purchasers, to set aside the sales, one object of inquiry in that court would have been, whether they were made by sufficient authority: and if it had found that they were not, they must have been set aside. But who ever heard, till this act was passed, that the legislatures under our constitutions have not power to sell the public property, or give it away? This has always been considered as one of the most essential branches of legislative authority. It has been exercised by every legislative body in the Union; and by that of Georgia, in numerous instances. If the legislature has a right to dispose of the public lands, which cannot be denied, it may dispose of them in what quantities and on what conditions it thinks fit: for the right being unrestricted, so must be its exercise.

The second ground, the ground of fraud and corruption, was equally a subject of judicial inquiry. There cannot be a doubt, that if a legislative body, in making a contract, has been imposed on, it will, equally with an individual, be entitled to relief; but, like an individual, it must seek this relief in a court of justice. In a bill filed in this case for setting aside the sales, the allegation of fraud would have been inquired into, and, if supported by proper proof, would no doubt have been a sufficient ground for relief. This course the state might have pursued. In this manner it might have obtained whatever remedy it is entitled to, in law and justice.

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But what is the nature of the fraud complained of; and by what proof is the charge supported?

The act does not pretend that the legislature which made these sales was deceived, was imposed on; but that some individuals among them were corrupted. Do the circumstances alledged amount to corruption? Can the motives of individual members be inquired into, in order to invalidate the acts of a legislative body?

It is alledged by the act "That a majority of those members of the legislature who voted in favour of the sales, were engaged in the purchase." There are various other vague and general charges, but this is the only specific fact alleged. It is not even pretended that a majority of the legislature was concerned, but only "a majority of those who voted for the sales." Admitting this to be true, was it an act of corruption? It might be considered perhaps as an impropriety; but on what ground can it be stigmatized as corrupt? It is not stated that those persons were bribed; that they were to receive money for their votes, or even to have part of the land without paying for it; but simply, that they were concerned in the purchase. But are there no other corrupt motives, which could induce a member to vote for a sale of public property, in which he himself was concerned? Might he not regard the sale, especially as it was of lands, the benefit of which to the public depends on their being cultivated, as advantageous to the state as well as to the purchasers? Might it not in fact be so? It is a rule of law, that if an act can be fairly accounted for on proper motives, corrupt ones shall not be presumed.

But it is believed that a legislative act, can never be invalidated on account of the motives, from which it may have been agreed to by individual members: that those motives can never be brought into question. Could such inquiries be instituted, where could be the end of them? By what mode of proof should they be conducted? What a door would be opened to fraud and uncertainty of every kind! The very foundations of legislative authority would be shaken; and all its acts might be nullified by the fraud or the artifices of

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individuals. If the legislature, considered as an individual, have been imposed on, like an individual it may be relieved: if it have exceeded the bounds of its authority, its acts are null; but the motives of its members can never be questioned without striking at the root of law, and introducing scenes of confusion a thousand times more intolerable, than any evils which it could be intended to remedy.

The proofs of this corruption, which come next to be considered, are stated by the act under four heads: affidavits; presentments of grand juries; petitions and remonstrances; and the circumstance of a larger sum having been rejected for the same property.

It is well known that the presentments of a grand jury are never admitted as evidence in courts of justice. Even the testimony on which they are founded is, for the most part, of such a nature that it could not be received there. They serve as the foundations of inquiry, but never as proof of a fact. Such of the presentments in question as have been seen, even if they were admitted as evidence, would prove nothing; for they either denounce the sales in general terms, as injurious to the public, and improperly obtained, or merely state the fact of some members having been concerned, or requested to be so, in the purchase.

Still less can remonstrances and petitions be relied on in the decision of legal rights. The means by which they are frequently obtained, and the slight grounds whereon they sometimes rest, are too well known to need any observations.

As to the rejection of a large offer, it may have been a very wise step. The security may have been deemed insufficient. The offer may have been considered as delusive. It is not known by the counsel, much less insinuated, that this was the case; but it is sufficient that it may have been so considered by the legislature, and, therefore, may have furnished them with a very upright, though perhaps ill-judged motive for their rejection. The fact is, that the offer was made by only four or five individuals; while the companies who purchased consisted of a very considerable number. The latter also paid a large sum in advance, which it is not

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understood that the former proposed. Under these circumstances, surely it is not necessary to resort to corrupt motives for the preference.

On the subject of the affidavits, all of which have been carefully examined, several important observations occur.

In the first place, they were ex parte, taken in private, before a committee of the house of representatives; the witnesses not confronted with those persons against whom their testimony was to operate; not subjected to cross-examination. The admission of testimony taken in this manner is no less contradictory to the practice of every court known to the American constitutions, than to the plain principles of natural justice. Had those witnesses been cross-examined, it is impossible to tell what circumstances might have appeared to give a different complexion to the whole case. In testimony too not delivered from the mouth of the witness himself, but taken in writing, and taken by one side only, it is natural to presume that whatever makes in favour of that side, will be more particularly dwelt on, and more strongly expressed; while such parts as seem opposed to it are apt to be either omitted or stated imperfectly. This arises from the natural imperfection of the human mind, from the effect of our passions on our understanding, and our conduct. Hence has resulted a rule which is invariably observed in all our courts; that testimony is never admitted, unless both parties have had an opportunity of joining in the examination.

In the case of these affidavits, it is affirmed, that the examining committee refused to take down material parts of the testimony actually given by the witnesses, and tending to exculpate the members accused of corruption.* In the uncertainty that there is, whether this fact may not have been misunderstood, the respect due to such a body as the committee of a legislative assembly, represses those remarks, to which, if true, it must give rise.

But the evidence itself, if properly taken, is liable to many strong objections.

* See affidavits of Flourney & Clayton.

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In some instances it is contradictory,* and conjectural.† It depends in a great degree on hearsay,‡ which the best known rules of law, and the dictates of common justice, concur in rejecting. It consists almost wholly of the confessions of members made, not to the legislature, or the committee, but to the witnesses, about the impropriety of their own conduct; and finally, the whole scope of it is to prove that certain members, who voted for the law, were actuated by corrupt motives; a point which it has been shown, can never be inquired into, for the purpose of invalidating a legislative act.

It is worthy of remark also, that the members who appear, by these affidavits, to have been concerned in the contract, were to pay their portion of the purchase money.‖ There is, indeed, one instance of the contrary: but it is proved by the hearsay confession, not of the member himself, but of a person, who declared himself to be one of the purchasers.§

This testimony, therefore, whether its substance be regarded, or the manner of its being taken, appears equally defective.

But, if it were less so, if the proofs of corruption in the legislature, were not only admissible but strong, they would be greatly counterbalanced, by the conduct of the governor. He has never been accused, or even suspected, of corruption. It can hardly be conceived, that, pure himself, he would have aided the corruption of others; would have sanctioned an act which he knew to have originated in motives so flagitious. Had these practices existed, it is next to impossible that they should have escaped his knowledge: for he was not only on the spot, and well acquainted with all the actors in this business, but lived in the closest connection and intimacy, with some of its warmest opposers.**

* Affidavits of James Tyrol and Russel Jones.
† Do. and Philip Clayton and John Thomas.
‡ See affidavits throughout.
‖ See affidavits of Van Allen, Rains and Lucas.
§ Do. of James M. Neil.
** A leading member of the Senate, who was the governor's son-in-law, and lived in his house, was one of the most strenuous in opposition.

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It cannot be pretended that the governor countenanced this act through deference for the legislature; for the same motive would have led him to concur in the first bill, which, however, was rejected. He must, therefore, have assented to the second, because he found it free from those objections which had operated against the first; and considered it as conducive to the public good. Why may not the legislature be conceived to have acted from the same motives? Must corruption be resorted to in order to find a reason for their doing an act, which the governor, equally enlightened with them, was led to by a sense of duty?

Thus it seems clear that the legislature of Georgia was wholly incompetent to set aside this act, even had there been sufficient grounds; because this is a judicial, not a legislative function, and because the sale was a contract to which the state itself was a party: that had the legislature been competent, the evidence on which it proceeded was not only inconclusive, but altogether inadmissible: And that, since to dispose of the public land is one of the most undeniable powers of the legislature, and the motives of members, even if corrupt, which in this case is far from being established, cannot be alledged against the validity of a legislative act, there was no ground, either of unconstitutionality or corruption, upon which, even in a competent tribunal, this act could have been declared void.

It is proper to add that even if this contract could be set aside, an essential condition of doing so must be the repayment of the purchase money. It is one of the most obvious improprieties in the repealing act, that it attempts to destroy the purchase without making the least provision, or even stipulation, for their repayment.* If, as it has been asserted, the legislature which passed the repealing act made an appropriation of part of this money, it was a complete confirmation, as far as depended on them, of the contract which they avowed an intention of annulling.†

From this view of the two points submitted, taken

* See ante page 387. † See the Case of Cole v. Gibbons. P. W.

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under all those aspects which were deemed important, the undersigned counsel is led to the following conclusion, which he certifies as his opinion: 1. That the United States never had a right to any part of the lands in question, above a line drawn due east from the mouth of the Yazoo: 2. That, under the circumstances of the case, they will probably be considered, in the courts of equity, as bound by the sales which have been made by the state of Georgia below that line: And 3. That the title of the purchasers, either above or below, can in no degree be affected by the repealing act of that State.

ROB. G. HARPER.

New-York, Aug. 3rd, 1796.

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PAPERS REFERRED TO, IN THE FOREGOING OPINION.

No. 1. An extract from the treaty of Paris in 1763.
2. British proclamation, Oct. 7, 1763.
3. Report of the board of trade respecting the extension of Florida.
4. Extract from the instructions to governor Chester.
5. Act of Georgia for asserting her limits, February, 1783.
6. Answers to Joseph Purcell.
7. Act of South-Carolina, for confirming the convention of Beaufort.
8. Act of Georgia for selling to several companies in 1789.
9. Representation by the commissioners of the U. S. to Spain.
10. Report from secretary of state on Spanish claims.
11. Act for the sales by Georgia in 1795.
12. Clause of the repealing act.
13. Governor's communication to the Georgia legislature, at the session of 1796.
14. The repealing act.
15. Resolution of Congress, Oct. 26, 1787.
16. Extract from major Pinckey's representation to the court of Spain.
17. Opinion of Col. Hamilton.

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No. I.

Extract from the treaty of peace in 1763, *taken from the 3d vol. of Collection of treaties, page* 188.

20th. In consequence of the restitution stipulated in the preceding article, his Catholic Majesty cedes and guarantees, in full right to his Britannic Majesty, Florida, with Fort St. Augustin and the bay of Pensacola, as well as all that Spain possessed on the continent of North America, to the east or to the south-east of the river Mississippi. And in general, every thing that depends on the said countries and lands, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise, which the Catholic King and the crown of Spain, have had till now over the said countries, lands, places and their inhabitants, so that the Catholic King, cedes and makes over the whole to the king, and to the crown of Great Britain, and that in the most ample manner and form.

A true copy,

CHARLES LEE.

No. II.

BY THE KING.

A PROCLAMATION.

GEORGE R.

Whereas we have taken into our royal consideration, the extensive and valuable acquisitions in America, secured to our crown by the late definitive treaty of peace concluded at Paris the 10th day of February last; and being desirous that all our loving subjects, as well of our kingdoms as of our colonies in America, may avail themselves, with all convenient speed of the great benefits and advantages which must accrue therefrom to their commerce, manufactures, and navigation; we have thought fit with the advice of our privy council, to issue this royal proclamation, hereby to publish and declare to all our loving subjects, that we have, with the advice of our said privy council, granted our letters patent under our great seal of Great Britain, to erect within the countries and islands, ceded and confirmed to us by the said treaty, four distinct and separate governments, stiled and called by the

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names of Quebeck, East Florida, and West Florida, and Grenada, and limited and bounded as follows, viz.

First the government of Quebec, bounded on the Labrador coast by the river St. John, and from thence by a line drawn from the head of that river, through the lake St. John to the south end of the lake Mipissim; from whence the said line, crossing the river St. Lawrence and the lake Champlain, in 45 degrees of north latitude, passes along the highlands, which divide the rivers that empty themselves into the said river St. Lawrence, from those which fall into the sea; and also along the north coast of the Bay des Chaleurs, and the coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the river St. Lawrence by the west end of the island of Anticosti, terminates at the aforesaid river St. John.

Secondly, The government of East-Florida, bounded to the westward by the Gulph of Mexico and the Apalachicola river; to the northward, by a line drawn from that part of the said river where the Chatahouchee and Flint rivers meet to the source of St. Mary's river, and by the course of the said river to the Atlantic Ocean, and to the east and south by the Atlantic Ocean, and the Gulph of Florida, including all islands within six leagues of the sea coast.

Thirdly, the government of West-Florida, bounded to the southward by the Gulph of Mexico, including all islands within six leagues of the coast from the river Apalachicola to lake Ponchartrain; to the westward of the said lake, the lake Maurepas, and the river Mississippi; to the northward, by a line drawn due east from that part of the Mississippi which lies thirty-one degrees north latitude, to the river Apalachicola, or Catahouchee; and to the eastward by the said river.

Fourthly, The government of Grenada, comprehending the island of that name, together with the Grenadines, and the islands Dominico, St. Vincent and Tobago.

And to the end that the open and free fishery of our subjects may be extended to, and carried on upon the coast of Labrador and the adjacent islands, we

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have thought fit, with the advice of our said privy counsel, to put all that coast from the river St. John's to Hudson's Straits, together with the islands of Anticosta and Madelaine, and all other smaller islands lying upon the said coast, under the care and inspection of our governor of Newfoundland.

We have also, with the advice of our privy council, thought fit to annex the islands of St. John and Cape Breton, or Isle Royale, with the lesser islands adjacent thereto, to our government of Nova-Scotia.

We have also, with the advice of our privy council aforesaid, annexed to our province of Georgia, all the lands lying between the rivers Alatamaha and St. Mary's.

And, whereas, it will greatly contribute to the speedy settling our said new governments, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are, and shall become inhabitants thereof; we have thought fit to publish and declare, by this our proclamation, that we have, in the letters-patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of our said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America, which are under our immediate government; and we have also given power to the said governors, with the consent of the said councils, and the representatives of the people, so to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare and good government of our said colonies, and of the people and inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions as are used in other countries; and in the mean time, and until such assemblies can be called as aforesaid, all persons inhabiting in, or resorting to our said colonies,

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may confide in our royal protection for the enjoyment of the benefit of the laws of our realm of England; for which purpose we have given power under our great seal to the governors of our said colonies respectively, to erect and constitute, with the advice of our said councils respectively, courts of judicature and public justice within our said colonies, for the hearing and determining all causes, as well criminal as civil, according to law and equity, and as near as may be, agreeable to the laws of England, with liberty to all persons who may think themselves aggrieved by the sentence of such courts, in all civil cases, to appeal, under the usual limitations and restrictions, to us in our privy council.

We have also thought fit, with the advice of our privy council as aforesaid, to give unto the governors and councils of our said three new colonies upon the continent, full power and authority, to settle and agree with the inhabitants of our said new colonies, or to any other persons who shall resort thereto, for such lands, tenements, and hereditaments, as are now, or hereafter shall be, in our power to dispose of, and them to grant to any such person or persons, upon such terms, and under such moderate quit-rents, services and acknowledgments, as have been appointed and settled, in other colonies, and under such other conditions, as shall appear to us to be necessary and expedient for the advantage of the grantees, and the improvement and settlement of our said colonies.

And whereas we are desirous, upon all occasions, to testify our royal sense and approbation of the conduct and bravery of the officers and soldiers of our armies, and to reward the same, we do hereby command, and empower our governors, of our said three new colonies, and other our governors of our several provinces, on the continent of North America, to grant, without fee or reward, to such reduced officers as have served in North America, during the late war, and are actually residing there, and shall personally apply for the same, the following quantities of land, subject, at the expiration of ten years, to the same quit-rents as other lands are subject to, in the province within which they

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are granted, as also subject to the same conditions of cultivation and improvements, viz.

To every person having the rank of a field officer, 5,000 acres.

To every captain, 3,000 acres.

To every subaltern, or staff-officer, 2,000 acres.

To every non-commissioned officer, 200 acres.

To every private man, 50 acres.

We do likewise authorize and require the governors and commanders in chief, of all our said colonies, upon the continent of North America, to grant the like quantities of land, and upon the same conditions, to such reduced officers of our navy, of like rank, as served on board our ships of war in North America, at the times of the reduction of Louisburgh and Quebec, in the late war, and who shall personally apply to our respective governors for such grants.

And whereas, it is just and reasonable, and essential to our interest, and the security of our colonies, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed, in the possession of such parts of our dominions and territories as, not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds; we do, therefore, with the advice of our privy council, declare it to be our royal will and pleasure, that no governor or commander in chief, in any of our colonies of Quebec, East-Florida or West-Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments, as described by their commissions; as also, that no governor or commander in chief of our other colonies or plantations in America, do presume, for the present, and until our further pleasure be known, to grant warrants of survey, or pass patents for any lands, beyond the heads or sources of any of the rivers which fall into the Atlantic ocean, from the west or north west; or upon any lands whatever, which not having been ceded to, or purchased by us, as aforesaid, are reserved to the said Indians, or any of them.

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And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories, not included within the limits of the said three new governments, or within the limits of the territory granted to the Hudson's Bay company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west, as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license, for that purpose first obtained.

And we do further strictly enjoin and require all persons whatever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands, which not having been ceded to, or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such interruption for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our privy council, strictly enjoin and require that no private person do presume to make any purchase from the said Indians, of any lands reserved to the said Indians, within those parts of our colonies, where we have thought proper to allow settlement; but, that if at any time, any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the governor, or commander in chief of our colony, respectively, within which they shall lie; and in case they shall lie within the limits of any proprietaries,

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conformable to such directions and instructions, as we, or they shall think proper to give for that purpose: and we do, by the advice of our privy council, declare and enjoin, that the trade with the said Indians shall be free and open to all our subjects whatever, provided that every person who may incline to trade with the said Indians, do take out a license for carrying on such trade, from the governor or commander in chief of any of our colonies respectively, where such person shall reside, and also give security to observe such regulations as we shall at any time think fit, by ourselves, or commissaries, to be appointed for this purpose, to direct and appoint for the benefit of the said trade: and we do hereby authorize, enjoin and require the governors and commanders in chief of all our colonies respectively, as well those under our immediate government, as those under the government and direction of proprietaries, to grant such licenses without fee or reward, taking especial care to insert therein a condition that such license shall be void, and the security forfeited, in case the person to whom the same is granted, shall refuse or neglect to observe such regulations as we shall think proper to prescribe as aforesaid.

And we do further expressly enjoin and require all officers whatever, as well military as those employed in the management and direction of Indian affairs, within the territories reserved, as aforesaid, for the use of the said Indians, to seize and apprehend all persons whatever, who standing charged with treasons, misprisions of treason, murders, or other felonies or misdemeanours, shall fly from justice and take refuge in the said territory, and to send them under a proper guard to the colony, where the crime was committed of which they shall stand accused, in order to take their trial for the same.

Given at our court at St. James's the 7th day of October, 1763, in the third year of our reign.

God save the king.

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No. III.

TO THE KING'S MOST EXCELLENT MAJESTY.

May it please your Majesty,

BY your majesty's royal proclamation of the 7th of October last, and your majesty's commission to your governor of West-Florida, it is declared that the said province shall be bounded to the north, by a line drawn due east from that part of the river Mississippi which lies in 31 degrees north latitnde, to the river Apalachicola; but it is our duty to represent to your majesty, that we are informed by your majesty's governor, that it appears from observations and surveys, made since the said province has been in your majesty's possession, that there are not only very considerable settlements upon the east bank of the Mississippi above that line, but also that the town and settlement of Mobile itself is some miles to the north of it; and, therefore, we humbly beg leave to propose that an instrument may pass under the great seal, (in like manner as was directed in the case of the extention of the south boundary of Georgia,) declaring that the province of West Florida shall be bounded to the north by a line drawn from the mouth of the river Yasous, where unites with the Mississippi due east to the river Apalachicola, by which we humbly conceive every material settlement depending upon West Florida will be comprehended within the limits of that government.

Which is most humbly submitted.

HILSBOROUGH.
SOAME JENYNS.
ED. ELLIOTT.
GEO. RICE,
ORWELL.
BAM. GASCOINE.

Whitehall, March 23, 1764.

Office for Trade, Whitehall, 25th Sept. 1795.

I hereby certify, that the before written paper is a representation to the king, for enlarging the boundaries of West Florida, copied from the West Florida entry A. page 165.

GEO. CHALMERS.

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No. IV.

An extract from the instructions to the British governor of West Florida, Peter Chester, taken from an authentic copy, now in the possession of Philip Livingston, Esq. of New-York, who was secretary of that province under governor Chester, viz.

"G. R. INSTRUCTIONS to our trusty and well beloved Peter Chester, Esq. our captain general and governor in chief, in and over our province of West Florida in America, and all other our territories dependant thereon—Given at our court of St. James's, the second day of March, 1770, and in the tenth year of our reign."

1. With these our instructions you will receive our commission, under our great seal of Great Britain, constituting you our captain general and governor in chief, in and over our province of West Florida, in America. Bounded to the southward by the Gulph of Mexico, including all islands within six leagues of the coast, from the river Apalachicola to lake Pontchartrain; to the westward by the said lake, the lake Maurepas and the river Mississippi; to the northward by a line drawn due east from the mouth of the Yasous river, where it unites with the Mississippi, due east to the river Apalachicola."

No. V.

A clause of an act, entitled "An act for opening the land office, and for other purposes therein mentioned," passed at Savannah, the 17th day of February, 1783, viz.

AND whereas it may so happen that persons emigrating from elsewhere, disposed to settle in this state, may not be sufficiently acquainted with the limits and boundaries of the same, and surveyors may wilfully or ignorantly commit mistakes in running of lines, unless the limits and boundaries be made known to them; in order, therefore, to inform and encourage all persons disposed to migrate into this state, to prevent mistakes, and to remove every pretence for fraud in surveyors, and others entrusted with the execution of this law, be it enacted, ordained, and declared by the authority aforesaid, that the limits, boundaries

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jurisdiction, and authority of the state of Georgia, do and did, and of right ought to extend from the mouth of the River Savannah, along the north side thereof, and up the most northern stream or fork of the said river to its head or source; from thence in a due west course to the River Mississippi, and down the said stream of the Mississippi, to the latitude thirty one degrees north; from thence in a due east course to the River Apalachicola or Chatahootchee, and from the fork of the said River Apalachicola where Chatahootchee and Flint Rivers meet, in a direct line, to the head or source of the southermost stream of the River St. Mary; and along the course of the said River St. Mary to the Atlantic Ocean, and from thence to the mouth or inlet of the River Savannah; including and comprehending all the lands and waters within the said limits, boundaries and jurisdictional right; and also all the islands within twenty leagues of the sea coast: and all justices of the peace, surveyors, militia, and other officers, and persons of any description or denomination whatsoever, are hereby enjoined and required, and fully authorized and empowered, to hold and consider the said limits, boundaries, and jurisdictional right above mentioned, expressed and described, as the true and just limits, boundaries and jurisdiction of the sovereign and independent state of Georgia, as secured to the inhabitants and free citizens thereof by their charter, guaranteed as well by the articles of confederation as by the treaty of alliance, with his most christian majesty: Provided, nevertheless, that nothing herein before contained shall extend, or be construed to extend, to authorize or empower any surveyor, or other person or persons whatever, to survey, run, or make lines, upon the lands before described, as being allowed to the Indians for hunting ground, or any part or parcel thereof, before or until permission for that purpose shall be granted by the legislature, and made known by proclamation.

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No. VI.

Extract from a representation made on oath, by Joseph Purcell of Charleston, formerly surveyor for the British government in Florida, in answer to certain queries.

"THE parallel of latitude 32 degrees and 40 minutes, intersects the Mississippi, 24 miles above the mouth of the Yazoo. The Natches district is bounded to the westward by the River Mississippi, and extends from Loftus's Clift, up the said River, to the mouth of the Yazoo, the distance being 110 miles. The said district was purchased from the Choctaw nation, by the British superintendant of Indian affairs, at a treaty held at Mobile, in May, 1777, and the lines as above described, were marked and surveyed by me, in 1779.

No. VII.

An Ordinance of the general assembly of the State of South-Carolina, entitled, "An ordinance for ratifying and confirming a convention between the states of South-Carolina and Georgia, &c. passed February 29th, 1788, from which it appears, that the state of South-Carolina has ceded to Georgia all right and claim to the territory, to be granted to the company, viz.

WHEREAS the state of South-Carolina, did heretofore present a petition to the United States, in Congress assembled, and did therein set forth, that a difference had arisen and subsisted between the state of South-Carolina and Georgia, concerning boundaries, the said states claiming respectively the same territories, and that the case and claim of the state of South-Carolina, was as follows, that is to say, "Charles the II. King of Great Britain, by charter, dated the 24th day of March, in the 16th year of his reign, granted to eight persons, therein named, as lord proprietors thereof, all the lands lying and being within his dominions of America, between thirty-one and thirty-six degrees of north latitude, in a direct west line to the South-Seas, stiling the lands so described, the province of Carolina: that on the 30th day of June, in the 17th year of his reign, the said king granted to the said

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lords, a second charter, enlarging the bounds of Carolina, viz. from twenty-nine degrees of north latitude, to thirty-six degrees, thirty minutes, and from those points on the sea coast west, in a direct line in the South-Seas: that seven of the said proprietors of Carolina, sold and surrendered to George the II. late King of Great Britain, all their title and interest in the said province, and the share of the remaining proprietor was separated from the king's, and allotted to him, in the north part of North-Carolina: that Carolina was afterwards divided into two provinces, called North and South-Carolina; that by a charter, dated the 9th of June, 1732, George the II. King of Great Britain, granted to certain persons therein named, all the lands lying between the Rivers Savannah and Alatamaha, and between lines to be drawn from the heads of those rivers, respectively, to the South-Sea, and stiled the said colony Georgia: that by the treaty of peace concluded at Paris, on the 10th day of February, 1763, the River Mississippi was declared to be the western boundary of the North American colonies: that the governor of South Carolina, in the year 1762, conceiving that the lands to the south of the Alatamaha, still belonged to South-Carolina, granted several tracts of the said land; that the government of Georgia complained to the King of Great Britain, respecting those grants, as being for land within its limits, and thereupon his majesty, by proclamation dated the 7th day of October, 1763, annexed to Georgia, all the lands lying between the Rivers Alatamaha and St. Mary's, the validity of the grants passed by the governor of South-Carolina as aforesaid, remaining, however, acknowledged and uncontested, and the grantees of said land, or their representatives still holding it as their legal estate; that South-Carolina claims the land lying between the North Carolina line, and a line to run due west from the mouth of Tugoloo River to the Mississippi, because as the said state contends the River Savannah loses that name at the confluence of Tugoloo and Keowee Rivers, consequently, that spot is the head of Savannah River; the state of Georgia on the other hand contends, that the source of Keo-

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wee River, is to be considered as the head of Savannah River; that the state of South-Carolina also claims all the lands lying between a line to be drawn from the head of the River St. Mary's, the head of Alatamaha, the Mississippi, and Florida, being, as the said state contends, within the limits of its charter, and not annexed to Georgia by the said proclamation of 1763: the state of Georgia, on the other hand, contends, that the tract of country last mentioned is a part of that state: the state of South-Carolina, did, therefore, by their said petition, pray for a hearing and determination of the difference and dispute subsisting as aforesaid between the said state and Georgia, agreeable to the article of confederation, and perpetual union between the United States of America: *And whereas* the state of Georgia, were duly notified of the said petition, and did by their lawful agents appear, in order to establish their right to the premises in manner directed by the said articles of confederation, and proceedings were thereon had in congress in order to the appointment of judges to constitute a court for hearing and determining the said matter in question: *And whereas* it appeared to be the sincere wish and desire of the said states of South-Carolina, and Georgia, that all and singular the differences and claims subsisting between the said states relative to boundary, should be amicably adjusted, and compromised: *And whereas* the legislature of the state of South-Carolina, did elect Charles Cotesworth Pinckey, Andrew Pickens, and Pierce Butler, Esquires, commissioners, and did invest them, or a majority of them, with full and absolute power and authority in behalf of that state, to settle and compromise all and singular the differences, controversies, disputes and claims, which subsist between the said state, and the state of Georgia, relative to boundary, and to establish and permanently fix, a boundary between the two states: And the said state of South-Carolina, did declare, that it would, at all times thereafter, ratify and confirm, all and whatsoever the said commissioners, or a majority of them, should do in and touching the premises, and that the same should be forever binding on the said state of South-

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Carolina: *And whereas* the legislature of the state of Georgia, did appoint John Huston, John Habersham, and Lachlan M'Intosh, Esquire's, commissioners, and did invest them with full and absolute power and authority, in behalf of that state, to settle and compromise all and singular the differences, controversies, disputes and claims, which subsist between the said state, and the state of South-Carolina, relative to boundary, and to establish and permanently fix a boundary between the two states; and the state of Georgia, did also declare, that it would at all times thereafter, ratify and confirm all, and whatsoever the said last mentioned commissioners, or a majority of them, should do in and touching the premises, and that the same should be forever binding on the said state of Georgia: *And whereas* the said Charles Cotesworth Pinckney, Andrew Pickens, Pierce Butler, John Habersham, and Lachlan M'Intosh, Esquire's, commissioners on the part of the states of South-Carolina, and Georgia respectively, did by mutual consent, assemble at the town of Beaufort, in the state of South-Carolina, on the 24th day of April, 1787, in order to the execution of their respective trusts, and did reciprocally exchange and consider their full powers, and did declare the same legal and forever binding on both states, and on conferring on the most effectual means of adjusting the differences subsisting between the said states, and of establishing and permanently fixing a boundary between them, did mutually agree for and in behalf of their respective states to the following articles: that is to say,

Art. I. The most northern branch or stream of the River Savannah, from the sea or mouth of such stream in the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence to the most northern branch or stream of the said River Tugoloo, till it intersects the northern boundary line of South-Carolina, if the said branch or stream extends so far north, reserving all the islands in the said Rivers, Tugoloo and Savannah, to Georgia; but if the head spring or source of any branch or stream of the said River Tugoloo, does not extend to the north boundary

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line of South-Carolina, then a west line to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugoloo River, which extends to the highest northern latitude, shall forever hereafter form the separation, limit and boundary between the states of South-Carolina and Georgia.

Art. II. The navigation of the River Savannah at and from the bar, and mouth along the north-east side of Cock-spur Island, and up the direct course of the main northern channel along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of the said Island, and from thence up the bed or principal stream of the said river, to the confluence up the channel of the most northern stream of Tugoloo River to its source, and back again by the same channel to the Atlantic Ocean, is hereby declared to be henceforth equally free to the citizens of both states, and exempt from all duties, tolls, hindrance, interruption or molestation whatsoever, attempted to be enforced by one state on the citizens of the other; and all the rest of the River Savannah to the southward of the foregoing description, is acknowledged to be the exclusive right of the state of Georgia.

Art. III. The state of South-Carolina shall not hereafter claim any lands to the *eastward, southward, southwestward, or west* of the boundary *above established*, but hereby *relinquishes and cedes* to the state of Georgia *all the right, title and claim* which the state of South-Carolina hath to the government, sovereignty and jurisdiction, in and over the same, and also the *right and pre-emption of the soil* from the native Indians, and all other the *estate, property and claim* which the state of South-Carolina hath in or to the said lands.

Art. IV. The state of Georgia shall not hereafter claim any lands to the northward, and north-eastward of the boundary above established, but here relinquishes and cedes to the state of South-Carolina all the right, title and claim which the said state of Georgia hath to the government, sovereignty and jurisdiction in and over the same, and also the right of pre-emption of the soil from the native Indians, and all other the estate, property and claim which the state of Georgia hath in or to the said lands.

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Art. V. The lands heretofore granted by either of the said states between the forks of Tugoloo and Keowee, shall be the private property of the first grantees, and their respective heirs and assigns; and the grantees of any of the lands under the state of Georgia shall, within twelve months from the date hereof, cause such grants or authentic copies thereof, ratified under the seal of the state of Georgia, to be deposited in the office of the secretary of state of South Carolina, to the end that the same may be recorded there, and after the same shall have been so recorded, the grantees shall be entitled to receive again from the said secretary, their respective grants to the copies thereof, whichsoever may have been so deposited, without any charge or fees of office whatsoever, and every grant, of which the copy certified as abovementioned, shall not be deposited, shall be adjudged void.

Art. VI. The commissioners on the part of the state of South Carolina do not by any of the above articles, mean to cede, relinquish or weaken the right, title and claim of any individual citizens of the state of South-Carolina, to any land situated in Georgia, particularly to the lands situated to the south or southwest of the river Alatamaha, and granted during the administration of governor Boone, in 1763, and they do hereby declare, that the right and title of the said citizens to the same, is and ought to remain as full, strong and effectual as if this convention had not been made. The commissioners on the part of the state of Georgia do decline entering into any negociation relative to the lands mentioned in this article, as they conceive they are not authorized so to do by the powers delegated to them.

Be it therefore ordained, That the said convention, and all the articles thereof, shall be forever binding on the state of South-Carolina, and that the same is hereby fully and absolutely ratified and confirmed.

JOHN LLOYD, *President of the Senate.*

JOHN JULIUS PRINGLE, *Speaker of the House of Representatives.*

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No. VIII.

An act "for disposing of certain vacant lands or territory within this state." (Georgia.)

Whereas, divers persons from the state of Virginia, North-Carolina and South-Carolina, have made application for the purchase of certain tracts and parcels of land, lying and bordering on the Tenessee, Tom, or Donbigby, Yazoo and Mississippi Rivers, within this state, and have offered to engage to settle the same; a part of which territory has been already settled on behalf of some of the applicants, under and by virtue of an act of the general assembly of this state, bearing date the 7th of February, 1785, at Savannah, entitled "*An act for laying out a district of land, situated on the river Mississippi, within the limits of this state, into a county to be called Bourbon.*"

Now, therefore, be it enacted, by the senate and house of representatives of the state of Geargia, in general assembly met, that all that tract or part of territory of this state, within the following limits, *to wit;* beginning at the mouth of Cole's Creek, on the Mississippi, continuing to the head spring or source thereof, from thence a due east course to the Tombigby river, then continuing along the middle of the said river up to the latitude thirty-three, bounding on the territory of the Virginia Yazoo Company, a due west course to the middle of the Mississippi, thence down the middle of the Mississippi to the mouth of Cole's Creek aforesaid, and containing about five millions of acres, shall be reserved as a pre-emption for the South-Carolina Yazoo Company, for two years from and after the passing of this act, and if the said South-Carolina Yazoo Company, shall, within the said term of two years, put into the treasury of this state, the amount of 66,964 dollars, then it shall be lawful for the governor, at the time being, and he is hereby empowered and directed to sign and deliver a grant in the usual form, to Alexander Moultrie, Isaac Huger, William Clay Snipes, and Thomas Washington, Esquires, and the rest of their associates, and to their heirs and assigns forever, in fee-simple, as tenants in common, of all the tract of land included in the aforesaid boundaries: Provided, that the said grantees

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tees shall forbear all hostile attacks on any of the Indians hordes, which may be found on or near the said territory, if any such there be, and keep this state free from all charge and expences which may attend the preserving of peace between the said Indians, and extinguishing the claims of the said Indians, under the authority of this state; and provided further, and it is hereby expressly conditioned, that this state and the government thereof, shall, at no time hereafter, be subject to any suit at law or in equity, or claim or pretension whatever, for, or on account of any deduction in the quantity of the said territory by any recovery, which may or shall be had on any former claim or claims.

And for the better direction of the governor, *Be it enacted*, That the treasurer of this state shall, on application of any agent of either of the said companies, within the said term of two years, receive the sum or sums of money, which they are hereby respectively directed to advance; a certificate of which payment, under the hand of the treasurer, shall be a sufficient voucher for the governor to issue the grants to the respective companies as aforesaid.

And be it further enacted, That all the remaining vacant territory belonging to this state, shall be disposed of as this or any future general assembly shall direct, and in no other manner whatever.

SEABORN JONES, *Speaker of the House of Representatives.*

N. BROWNSON, *President of the Senate.*

CONCURRED, Dec. 21, 1789.

EDWARD TELFAIR, *Governor.*

GEORGIA.

No. IX.

Extract from a representation made to the Court of Spain on the subject of boundary, &c. by the Commissioners of the United States, on the 7th Dec. 1793.

In this stage of their government the several boundaries were fixed, and particularly the southern boundary of Georgia, the one now brought into question by Spain. This boundary was fixed by the Proclama-

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tion of the King of Great Britain, their chief magistrate, in the year 1763, at a time when no other power pretended any claim whatever to any part of the country through which it run—The boundary of Georgia was thus established to begin in the Mississippi, in latitude 31 north, and running eastwardly to the Apalachicola, &c. From what has been said, it results, 1. That the boundary of Georgia, now forming the southern limits of the United States, was lawfully established in the year 1763. 2. That it has since been confirmed by the only power who could, at any time, have pretensions to contest it."

No. X.

Extract from the report of Mr. Jefferson, Secretary of State, to serve as the basis of instructions to our Commissioners for settling the point in dispute with Spain.

As to boundary, that between Georgia and Florida is the only one which needs any explanation. Spain sets up a claim to possessions *within the state of Georgia*, founded on her having rescued them by force from the British during the late war. The following view of that subject seems to admit of no reply.

The several states now composing the United States of America, were, from their first establishment, separate and distinct societies dependent on no other society of men whatever. They continued at the head of their respective governments, the executive magistrate who presided over the one they had left; and thereby secured, in effect, a constant amity with the nation. In this stage of their government their several boundaries were fixed, and particularly, the southern boundary of Georgia, the only one now in question, was established at the first degree of latitude from the Apalachicola westwardly———The southern limits of Georgia depend chiefly on, 1. The charter of South Carolina, &c. 2. On the Proclamation of the British king in 1763, establishing the boundary between Georgia and Florida, to begin on the Mississippi, in 31 degrees north latitude, and running westwardly to the Apalachicola, &c.

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No. XI.

An act, supplementary to an act, entitled, "An act for appropriating a part of the unlocated territory of this state, for the payment of the late state troops, and for other purposes therein mentioned, declaring the right of this state to the unappropriated territory thereof, for the protection and support of the frontiers of this state, and for other purposes.

WHEREAS in and by the articles of confederation entered into and finally ratified on the first day of March, one thousand seven hundred and eighty-one, by the then thirteen United States of America, the territory within the limits of each of the said states, is to each of them respectively confirmed and guaranteed, first by the second article, to wit: Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled; and secondly, by the last clause in the second section of the ninth article: no state shall be deprived of territory, for the benefit of the United States.

And whereas in and by the definitive treaty of peace, signed at Paris, on the third day of September, one thousand seven hundred and eighty-three, the boundaries of the United States are established, and those boundaries which limit the westward and southwestward parts of this state, are therein thus defined: "Along the middle of the river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude, south by a line drawn due east from the termination of the line last-mentioned, in the latitude of thirty-one degrees north of the equator, to the middle of the River Apalachicola or Chatahochee; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River; and thence down along the middle of St. Mary's River, to the Atlantic Ocean:" Which boundaries coincide with the southwardly and westwardly boundaries recited in the land act now in force, passed at Savannah, on the seventeenth day of September, 1783; and by the convention held at Beaufort, on the twenty-eighth

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day of April, 1787, between this state and the state of South Carolina; the northern boundary of the state is established from the mouth of the River Savannah, up the said river to the confluence of Tugoloo and Keowee; thence up the Tugoloo, and from the source thereof a due west line to the Mississippi, including islands. *And whereas* in and by the first clause of the sixth article of the Federal Constitution of the United States of America, all engagements entered into before the adoption of the said Constitution, shall be as valid against the United States, under the said Constitution, as under the confederation. By the third clause of the ninth section of the first article of the said Constitution, no ex post facto law shall be passed, and by the second clause of the third section of the fourth article, the Congress shall have power to dispose of and make all necessary rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

And whereas the cession made by the state of North Carolina to the United States, by them accepted on the second day of April, 1790, is a full acknowledgment and recognizal on their part, that the several states not only have the right of pre-emption, but are in the full exercise of all territorial right within their respective limits. *And whereas*, notwithstanding the United States did, on the 22d day of July, 1790, by an act to regulate trade and intercourse with the Indian tribes, enact and declare, that no sale of lands made by Indians, or any tribe or nation of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States, and did on the seventh day of August, one thousand seven hundred and ninety, by a treaty held at New-York, with certain Creek Indians, stipulate by the fourth article of the said treaty, that the boundary between the citizens of the Unied States and the Creek Nation, is and

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shall be, from where the old line strikes the Savannah, thence up the said river to a place on the most northern branch of the same, commonly called the Keowee, where a north-east line, to be drawn from the top of Ocunna Mountain, shall intersect; thence along the said line in a south-west direction to the Tugoloo River; thence to the top of the Currahee Mountain; thence to the head or the source of the main south branch of Oconee River, called the Apalachee River; thence down the middle of the main south branch and River Oconee to its confluence with the Oakmulgee, which form the River Alatamaha; and thence down the middle on the said Alatamaha to the old line of the said river; and thence along the said old line to the River St. Mary's; and by the fifth article, that the United States, solemnly guarantee to the Creek Nation, all their lands within the limits of the United States, to the westward and southward of the boundary described in the preceeding article:

And finally, whereas the state of Georgia aforesaid, hath, by no act, or in any manner whatever, transferred, alienated or conveyed her right of soil, or pre-emption, in any part of the vacant territory within the limits of the said state, to the United States, the cession dated the 5th day of February, 1788, offered by the state of Georgia to the United States, having been, by the said United States, in Congress assembled, on the 15th day of July, 1788, rejected, in which rejection, territoral rights are declared to rest on the spirit and meaning of the confederation: *And whereas* the said proposed cession, became void, and on the part of this state, is hereby declared to be null and void to all intents, purposes, and constructions:

Be it therefore enacted by the senate and representatives of the freemen of the state of Georgia, in general assembly met, and it is hereby enacted by the authority of the same, That the state of Georgia aforesaid, is in full possession, and in the full exercise of the jurisdictional and territorial right, and the fee-simple thereof; and that the right of pre-emption, to vacant and unappropriated lands lying westwardly and southwestwardly of the present Indian temporary line, and within the

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limits of the said state, and the fee-simple thereof, together with the right of disposing thereof, is, and are hereby declared to be in the state of Georgia only: and for the purpose of raising a fund for carrying this act fully into effect;

Be it enacted, That all that tract or parcel of land including islands, situate, lying, and being within the following boundaries, that is to say: Beginning on the Mobile Bay, where the latitude thirty-one degrees north of the equator intersects the same, running thence up the said bay, to the mouth of Lake Tensaw; thence up the said Lake Tensaw to the Alabama River, including Currey's and all other islands therein; thence up the said River Alabama to the junction of the Coosa and Okfuskee Rivers; thence up the Coosa River, above the Big Shoal, to where it intersects the latitude of thirty-four degrees north of the equator; thence a due west course to the Mississippi River; thence down the middle of the said river to the latitude of thirty-two degrees, forty minutes; thence a due east course to the mouth of Tombigby River; thence down the middle of the said river to its junction with the Alabama River; thence down the middle of the said river to the Mobile Bay; thence down the said Mobile Bay to the place of beginning, shall be sold unto James Gunn, Matthew M'Allister, and George Walker, and their associates, called the GEORGIA COMPANY, and their heirs and assigns forever, in fee-simple, as tenants in common, and not as joint-tenants, for the sum of two hundred and fifty thousand dollars, to be paid in specie, bank bills of the United States, and warrants for the years one thousand seven hundred and ninety-one, one thousand seven hundred and ninety-two, one thousand seven hundred and ninety-three, one thousand seven hundred and ninety-four, and one thousand seven hundred and ninety-five, drawn by the Governor, the President of the Senate, and Speaker of the House of Representatives, in the following manner: that is to say, fifty thousand dollars to be deposited in the treasury previous to the passing of this act, and the remaining two hundred

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thousand dollars are to be paid on or before the first day of November next.

And be it further enacted, That whenever the said James Gunn, Matthew M'Allister, and George Walker, and their associates, or their agent, or agents shall produce to his excellency the governor, a receipt signed by the treasurer, that they have deposited the aforesaid sum of fifty thousand dollars, according to the tenor and effect of this act, it shall then be the duty of his excellency the governor, and he is hereby required to issue and sign to the said James Gunn, Matthew M'Allister, and George Walker, and their associates, their heirs and assigns, in fee simple, as tenants in common, and not as joint tenants, a grant for the aforesaid tract of country, they securing the last payment of two hundred thousand dollars to the state, by a mortgage to his excellency the governor and his successors in office, on the whole of the land so granted, which mortgage shall be immediately foreclosed, in case default shall be made in the payment of the said sum of two hundred thousand dollars, on or before the first day of November next, as aforesaid, in the superior court of any county within the state of Georgia, at the discretion of his excellency the governor, any law or usage, regulating the mode of foreclosing mortgages, to the contrary notwithstanding; and the whole sum of fifty thousand dollars deposited shall become forfeited to and for the use of the state; and the grant to be given to the said James Gunn, Matthew M'Allister, and George Walker, and their associates, to be and the same in that case is hereby declared to be null and void.

And be it further enacted, That the said Georgia Company shall reserve for and to the use of the citizens of Georgia, exclusively, the quantity of one million of acres of their purchase, in the following manner, to wit: At the expiration of three months from and after the passing of this act, a subscription book shall be opened at the treasury office of this state, and be kept open for the term of four months thereafter, for the purpose of receiving subscriptions of the citizens for the said reserved lands: *Provided*, That no person

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who shall otherwise become a member or interested in either of the companies, herein contemplated, shall be allowed to subscribe for any part of said reserved land, and no person shall be permitted to subscribe for more than five thousand acres in his own name or in the name of any other citizen, unless duly authorized and appointed by him for that purpose, under a warrant of attorney executed in the presence of two or more witnesses, one of whom at least shall be a justice appointed for holding the inferior court of the county where the subscriber resides, which said power of attorney shall be lodged with the treasurer, as his voucher for entering such subscription; and *Provided also*, That the citizens of the respective counties shall not, at any time within three months, from and after the opening of the books of subscription as aforesaid, be allowed to subscribe for more or greater quantity of the said reserved lands, than the proportion hereinafter particularly described and limited, to wit: Chatham, one hundred and seventy thousand acres; Essingham, sixty-two thousand acres; Burke, one hundred and fifty-five thousand acres; Richmond, one hundred and fifty-five thousand acres; Columbia, one hundred and fifty-five thousand acres; Wilkes, two hundred and seventy-two thousand acres; Washington, one hundred and thirty-one thousand acres; Elbert, one hundred and thirty-one thousand acres; Greene, one hundred and twenty-five thousand acres; Franklin, seventy-eight thousand acres; Liberty, sixty-nine thousand acres; Glynn, thirty-two thousand acres; Camden, thirty-two thousand acres; M'Intosh, thirty-five thousand acres; Bryant, thirty-two thousand acres; Warren, ninety-three thousand acres; Oglethorpe, one hundred and sixteen thousand acres; Montgomery, twenty-three thousand acres; Scriven, thirty-eight thousand acres; and Hancock, ninety-six thousand acres. And it shall be the duty of the treasurer, in all cases of application to subscribe, to require an affidavit, in writing, in the following words: "I do solemnly swear, or affirm, that I am in no way interested, directly or indirectly, either as a member, or otherwise, in any company's purchase of lands in the west-

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ern part of this state, and that the subscription which I propose to enter, is in my own proper right, and to my use and benefit only." And it shall be the duty of the justices of the inferior courts, before whom warrants of attorney, authorizing subscriptions shall be executed, to require a like affidavit on the back of such warrant of attorney, before attesting the same; and the land so subscribed and paid for shall be held by such subscribers, in fee simple, as tenants in common, and not as joint tenants, on the same terms, and upon the same principles, with original purchasers of the company in which they shall subscribe, and shall be entitled to fair and equal representation in such company, in proportion to the quantity of land so by them subscribed and paid for.

And be it further enacted, That upon entering any subscription as aforesaid, it shall be the duty of the treasurer, and he is hereby required, to receive of the subscribers, the purchase money, being the proportion of one-fifth part of such subscription in terms of this act, the remaining four-fifths or balance of the purchase money, shall, within four months from and after the opening of the said book of subscription, be paid unto the treasury, in like manner as aforesaid; and in case such balance shall not be paid, on, or before the expiration of the said seven months, from the passing of this act, that then, and in that case, the subscriber or subscribers, so failing, shall be at liberty to withdraw their said subscriptions, together with the money so paid by them, and the lands so subscribed for by them, shall revert to, and be vested in the company in which such subscription shall have been made or entered.

And be it further enacted, That all that tract of country including Islands, situate, lying and being, within the following boundaries, that is to say: Beginning on the River Mississippi, at the place where the latitude of thirty-one degrees and eighteen minutes north of the equator, intersects the same; thence a due east course to the middle of Don or Tombigby River; thence up the middle of the said river, to where it intersects the latitude of thirty-two degrees and forty minutes north of the equator; thence a due west

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course along the Georgia Company line, to the River Mississippi, thence down the middle of the same, to the place of beginning, shall be sold to Nicholas Long, Thomas Glascock, Ambrose Gordon, and Thomas Cumming, and their associates, called the GEORGIA MISSISSIPPI COMPANY, to them and their heirs, and assigns forever, in fee simple, as tenants in common, and not as joint tenants, for the sum of one hundred and fifty-five thousand dollars, to be paid in gold or silver coin, bank bills of the United States, and such warrants as are made payable in the Georgia Company's purchase, in the manner following, that is to say: Thirty-one thousand dollars, to be deposited previous to the passing of this act, and the remaining one hundred and twenty-four thousand dollars, to be paid on or before the first day of November next.

And be it further enacted, That whenever the said Nicholas Long, Thomas Glascock, Ambrose Gordon, and Thomas Cumming, and their associates, or their agent or agents, shall produce to his excellency the governor, a receipt signed by the treasurer, that they have deposited the aforesaid sum of thirty-one thousand dollars, according to the tenor and effect of this act, it shall then be the duty of his excellency the governor, and he is hereby required, to issue and sign to the said Nicholas Long, Thomas Glascock, Ambrose Gordon, and Thomas Cumming, and their associates, their heirs and assigns, in fee simple, as tenants in common, and not as joint tenants, a grant for the aforesaid tract of country, they securing the last payment of one hundred and twenty-four thousand dollars to the state, by a mortgage to his excellency the governor and his successor in office, on the whole of the land so granted, which mortgage shall be immediately foreclosed in case default shall be made in the payment of the said sum of one hundred and twenty-four thousand dollars, on or before the first day of November next, as aforesaid, in the superior court of any county within the state of Georgia, at the discretion of his excellency the governor, any law or usage, regulating the mode of foreclosing the mortgages, to the contrary, notwithstanding, and the whole sum of thirty-

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one thousand dollars deposited, will become forfeited to and for the use of the state; and the grant to be given to the said Nicholas Long, Thomas Glascock, Ambrose Gordon, and Thomas Cumming, and their associates, as aforesaid, to be, and the same is hereby declared to be null and void.

And be it further enacted, That the said Georgia Mississippi Company, shall reserve for the use of the citizens of Georgia exclusively, the quantity of six hundred and twenty thousand acres of their purchase, to be subscribed, or, held and appropriated on the same terms, and to be represented in like manner, as the land reserved by the Georgia Company as aforesaid.

And be it further enacted, That all that tract of country including islands, situate, lying and being within the following boundaries, that is to say: Beginning at the Mississippi River, where the northern boundary line of this state strikes the same; thence along the said northern boundary line, due east to the Tennessee River; thence along the said Tennessee River, to the mouth of Bear-Creek; thence up Bear-Creek to where the parallel of latitude twenty-five British statute miles, south of the northern boundary line of this state intersects the same; thence along the said last mentioned parallel of latitude, across Tombigby or Twenty-Miles Creek, due west to the Mississippi River; thence up the middle of the said river to the beginning: shall be sold to John B. Scott, John C. Nightingale, and Wade Hampton, called the UPPER MISSISSIPPI COMPANY, and to their heirs, and assigns forever, in fee simple, as tenants in common, and not as joint tenants, for the sum of thirty-five thousand dollars, to be paid in specie, bank bills of the United States, and such warrants as are made payable in the Georgia Company's purchase, in manner following, that is to say: Five thousand dollars, part thereof to be deposited previous to the passing of this act, and the remaining sum of thirty thousand dollars, to be paid on or before the first day of November next.

And be it further enacted, That, whenever the said John B. Scott, John C. Nightingale, and Wade Hampton, or their agent or agents, shall produce to his exce-

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lency the governor, a receipt signed by the treasurer, that they have deposited the aforesaid sum of five thousand dollars, according to the tenor and effect of this act, it shall then be the duty of his excellency the governor, and he is hereby required, to issue and sign, to the said John B. Scott, John C. Nightingale, and Wade Hampton, their heirs and assigns, in fee simple, as tenants in common, and not as joint tenants, a grant for the aforesaid land, they securing the last payment of thirty thousand dollars to the state, by a mortgage to his excellency the governor and his successors in office, on the whole of the land so granted, which mortgage shall be immediately foreclosed, in case default shall be made in the payment of the said sum of thirty thousand dollars, on, or before the first day of November next, as aforesaid, in the superior court of any county within the state of Georgia, at the discretion of his excellency the governor, any law or usage, regulating the mode of foreclosing mortgages, to the contrary, notwithstanding, and the whole sum of five thousand dollars, deposited, shall become forfeited to, and for the use of the state; and the grant to be given to the said John B. Scott, John C. Nightingale, and Wade Hampton, as aforesaid, to be, and the same in that case, is hereby declared to be null and void.

And be it further enacted, That the said Upper Mississippi Company, shall reserve to and for the use of the citizens of Georgia exclusively, the quantity of one hundred and thirty-eight thousand acres of their purchase, to be subscribed for, held appropriated, on the same terms, and to be represented in like manner, as herein before pointed out, in respect to the lands reserved for the citizens in the Georgia Company.

And be it further enacted, That all that tract of land including Islands, situate, lying, and being within the following boundary lines; Beginning at the mouth of Bear Creek, on the south side of the Tennessee River; thence up the said creek to the most southern source thereof, thence due south to the latitude of thirty-four degrees ten minutes north of the equator; thence a due east course one hundred and twenty miles;

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thence a due north course to the Great Tennessee River; thence up the middle of the said river to the northern boundary line of this state; thence a due west course along the said line to where it intersects the Great Tennessee River, below the Mussel Shoals; thence up the said river to the place of beginning, shall be sold unto Zachariah Cox, Matthias Maher, and their associates, called the TENNESSEE Company, and to their heirs and assigns forever, in fee simple, as tenants in common, and not as joint tenants, for the sum of sixty thousand dollars, to be paid in specie, bank bills of the United States, and such warrants as are made payable in the Georgia Company's purchase, that is to say: twelve thousand dollars to be deposited as part thereof, previous to the passing of this act, and the remaining forty-eight thousand dollars, to be paid on or before the first day of November next.

And be it further enacted, That whenever the said Zachariah Cox, and Matthias Maher, and their associates, or their agent or agents, shall produce to his excellency the governor, a receipt signed by the treasurer, that they have deposited the said sum of twelve thousand dollars, according to the tenor and effect of this act, it shall then be the duty of his excellency the governor, and he is hereby required to sign and issue to the said Zachariah Cox, and Matthias Maher, and their associates, their heirs and assigns, in fee simple, as tenants in common, and not as joint tenants, a grant for the aforesaid tract of country, they securing the last payment of the forty-eight thousand dollars to the state, by a mortgage to his excellency the governor, and his successors in office on the whole of the land so granted, which mortgage shall be immediately foreclosed, in case default shall be made in the payment of the said sum of forty-eight thousand dollars, on or before the first day of November next, as aforesaid, in the superior court of any county, within the state of Georgia, at the discretion of his excellency the governor, any law or usage, regulating the mode of foreclosing mortgages to the contrary notwithstanding, and the whole sum of twelve thousand dollars deposited, shall become forfeited to and for the use of

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the state; and the grant to be given to the said Zachariah Cox, and Matthias Maher, and their associates aforesaid, to be, and the same in that case is hereby declared to be null and void.

And be it further enacted, That the said Tennessee Company shall reserve for and to the use of the citizens of Georgia, exclusively, the quantity of two hundred and forty-two thousand acres, to be subscribed for, held and appropriated on the same terms and to be represented in like manner as the lands reserved by the Georgia Company as aforesaid.

And be it further enacted, That the said Tennessee Company shall reserve a further quantity of fifty thousand acres, to be gratuitously divided share and share alike, between the commissioners appointed by this state, for the purpose of examining the quantity, quality and circumstances of the Great Bend of Tennessee River, which shall be held by them as tenants in common, and not as joint tenants, and be represented in like manner, as the lands reserved by the other companies, for the use of the citizens, as a compensation to the said commissioners for their services rendered the state in that capacity.

And be it further enacted, That all sums so paid by the citizens for lands subscribed for by them, agreeably to the terms of the act, shall be received in payment and as part of the purchase money of the said companies respectively.

And be it further enacted, That the grants to be issued to the respective companies in virtue of this act, shall be free from all further or other expense whatsoever, the fees of office accruing upon one grant to each company excepted, which shall be to the surveyor-general three dollars, to the governor of the state, three dollars, and to the secretary of the state, three dollars; and that the lands to be granted in pursuance of this act, shall be free from taxation until the inhabitants thereof are represented in the legislature.

And be it further enacted, That the said grantees and purchasers of the land aforesaid, shall forbear all hostile and wanton attacks on any of the Indian tribes which may be found within the limits of this state, and keep

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this state free from all charges and expenses, which may attend the preserving of peace between the said Indians and the grantees, and extinguishing the Indian claims to the territory included within their respective purchases: *And provided further*, That this state, and the government thereof, shall, at no time hereafter, be subject to any suit at law or in equity, or claim or pretension whatever, for or on account of any deduction in the quantity of the said territory, or on account of the amount of the purchase money to be paid as aforesaid, by any recovery which may or shall be had on any former or other claim or claims whatever.

And be it further enacted, That the money arising from the sale of the said territory, except what shall be appropriated to the extinguishment of Indian claims, as hereinafter expressed, shall be vested in six per cents. or such other stock in the funds of the United States, as may be directed by this or a future legislature, and the interest arising thereon, or so much thereof as may be necessary, shall be applied to the payment of the civil establishment, and contingent expenses of the government of this state.

And be it further enacted, That immediately after the Indian claims to the land lying between the Oconee and Oakmulgee Rivers, including that tract of country lying east of a line to be drawn from the place called Fort Romulus, on the Oakmulgee River, to the head of the St. Mary's River, or the northern extremity of the Akinfonoka Swamp may be extinguished, the grantees of the several companies and their associates are hereby authorized to apply to the government of the United States, for their concurrence in extinguishing the Indian claims to the different tracts of country by them severally hereby purchased, or as much thereof as to them may seem practicable, which extinguishment of claims to the lands so purchased, shall be at the proper expense of the respective companies, and within five years thereafter, the said companies shall severally form settlements on the lands where the claims may be extinguished, or

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forfeit the further sum of five thousand dollars, for each company so failing.

And be it further enacted, That the sum of ten thousand dollars, part of the first payment to be made by the companies aforesaid, shall be, and the same is hereby declared to be appropriated and set apart for the purpose of extinguishing the Indian claim, in addition to the twenty thousand dollars appropriated by the act entitled, "an act appropriating a part of the unlocated territory of this state, for the payment of the late state troops, and for other purposes therein mentioned."

And be it further enacted, That the several grantees and their associates, shall not be entitled to dispose of the said territory, in part or in whole, in any way or manner, to any foreign king, prince, potentate or power whatever, which condition shall be specially expressed in the face of the grant.

And be it further enacted, That all the lands lying westward and southward of the eastern boundary of the several company purchasers, and not included therein, estimated at one-fourth of the whole lands lying westward and southward of the eastern boundary of the said purchasers, and supposed to contain seven millions two hundred and fifty thousand acres, shall be, and the same is hereby declared to be reserved and set apart to, and for the use and benefit of this state, to be granted out or otherwise disposed of, as a future legislature may direct.

THOMAS NAPIER, *Speaker of the House of Representatives.*

BENJAMIN TELIAFERRO, *President of the Senate.*

GEO. MATHEWS, *Governor.*

CONCURRED, *January* 7, 1795.

Be it enacted, That any foreigner, first becoming a resident of this state, may, by deed or will, hereafter to be made, take and hold lands within this state, in the same manner as if he was a citizen of this state, and the same lands may be conveyed by him and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this state: *Pro-*

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vided, That no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen; *And provided*, That nothing herein contained, shall extend to authorize the governor to grant lands to any other than citizens of this or the United States.

Georgia, Secretary of States's Office, 10th January, 1795.

The underwritten Secretary of the State aforesaid, certifies the above to be a true extract from the act, entitled "An act for the appropriating money for the year one thousand seven hundred and ninety-five," passed the seventh day of January, one thousand seven hundred and ninety-five.

JOHN MILTON.

No. XII.

N. B. The clause here referred to is the 6th, of the 5th paragraph of the repealed act, for which see appendix, No. 14.

No. XIII.

AUGUSTA, January 28.

To the President and fellow-citizens of the Senate.

The senate and house of representatives, are now, constitutionally convened for legislative deliberations, and at a time too, when the minds of our fellow-citizens are, and have been, for some time past, more engaged in discussing the conduct of the last legislature, on the subject of the act, for disposing of part of our western territory to certain companies, than, perhaps, has ever been experienced since this state assumed rank with her sister states. It will, no doubt, be among the most important matters that may engross your attention, to inquire on what ground this act was founded, and if a constitutional and legal remedy can be applied to calm the minds of our fellow-citizens on this interesting subject: in my opinion it requires, and I flatter myself, will receive your most serious delibera-

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tion, whether a law can be constitutionally made to repeal another that has been fully carried into effect, as the one now in question, the companies having paid into the treasury the whole of the purchase money, and cancelled their mortgages; and whether, if repealed, the remedy may not even be worse than the disease. But, if a law can be devised that will constitutionally repeal the one referred to, and guard against future murmurs, and well grounded complaints against the repeal, I have no doubt, but the man you may honour with the appointment of the chief magistrate, will readily deem it a duty cheerfully to co-operate.

It is a matter much to be regretted, (considering the unfavourable light the act for disposing of our western territory has been viewed in,) that the spirit of party resentment and personal reflections should have ran so high, in many instances; the public mind has been inflamed by unfair representations, and our newspapers have teemed with personal abuse and invective; this, I remark, from having experienced the public slander; endeavours have been made to calumniate my character by false reports, such as that the motives which induced me to give my assent to the second act, proceeded from private interest, regardless of the sacred duty I owed to the station I filled, and the rights and interests of my fellow-citizens. Conscious of the purity of my intentions, and supported by the justice and integrity of my actions, I have treated with silent contempt those base and malicious reports, and I now defy the blackest and most persevering malice, aided by disappointed avarice, to produce one single evidence of my ever having been interested in the sale, to the amount of one single farthing: but whilst I treated with neglect those reports, so injurious to my character, I feel it a respect due to you, and a duty I owe to my reputation, to give you a candid and fair statement of the motives which actuated me on a subject which has so much disturbed the citizens of Georgia. On the 25th of December, 1794, an act for disposing of part of our western territory to four companies, was presented to me for my concur-

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rence; after the most mature reflection my judgment was capable of, I thought it my duty to refuse my assent, and assigned my reasons, which I flattered myself would have postponed any further legislative proceedings in the law, until the next meeting of the house; but in that I was mistaken. The first idea that occurred to some of the members when the bill was returned with remarks, was, that I should be impeached for an unconstitutional act; yet the more cool reflection of the house terminated in appointing a committee to confer with me on my objections, and to know if it was in the power of the legislature to frame a bill for the sale of the land which would meet my concurrence. On the conferrence, I was led to believe that the committee was convinced my reasons for rejecting the law, did not proceed from "Executive arrogance, or from a wish to bring into action a power heretofore dormant in our proceedings, or from a propensity in me to do an act of so great responsibility; but from a conviction that it would tend to the real interest of the state. The reflecting mind will easily perceive how much the responsibility would be enhanced by rejecting a bill that the legislature might pass for the sale of the lands, after being in possession of my remarks, even supposing it to be similar to the first; but when it appears that three of the most important objections I had made to the first law were removed, I think there is no man, of cool dispassionate reflection, that would have refused his assent to it for any reasons short of a clear proof of corruption in its passage through the legislature, *and no such information ever came to my knowledge.*

After all the popular clamour the law has occasioned, I should depart from my usual candour to say I have ever blamed myself, either for an error of the head, or a corruption of the heart, and on a similar occasion should feel myself perfectly justified in pursuing a similar conduct: Much has been said about unascertained millions of acres being sold, and that more than fifty millions of acres are disposed of to the companies by that act: after having thought it my duty to act on the second bill, I ordered the surveyor general to

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furnish me with as accurate a map of the country contemplated to be sold, as any documents he had or could procure, would afford—this was done, and is now on the file of the executive, from which it will appear there was no more than 29,400,000 acres in the whole aggregate the first law had in view, and one-fourth of that quantity is now reserved to the state, and subject to her disposition. This is a true state of facts, so far as they have come to my knowledge, and if it may afford you any useful hints in your deliberations, it will give me pleasure.

The sum of 500,000 dollars has been paid into your treasury in terms of the act, 50,000 of which has been realized in six per cent. stock of the United States, the interest arising therefrom since the purchase, amounting to 2,201 dollars 29 cents, has been paid into your treasury, as also the interest arising from the balance due to this state on the final settlement with the United States, amounting to 689 dollars 58 cents, and the treasurer's receipts for the original certificates, standing on the books of the loan office of the United States, are filed in the office of the cheque of the treasury—the sum of 30,000 dollars stand appropriated for extinguishing the Indian claims to the land between the Oconee and Oakmulgee Rivers, and 20,000 dollars have been applied to paying the members of the assembly, the members of the convention, and other creditors of the state; 400,000 dollars remain now in your treasury, subject to the appropriation of the present legislature.

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No. XIV.
A BILL

Declaring null and void a certain usurped act passed by the last legislature of this state, at Augusta, the seventh day of January, one thousand seven hundred and ninety five, under the pretended title of "An act, supplementary to an act, entitled, an act for appropriating a part of the unlocated territory of this state, for the payment of the late state troops, and for other purposes therein mentioned; declaring the right of this state to the unappropriated territory thereof, for the protection of the frontiers, and for other purposes:" And for expunging from the face of the public records the said usurped act, and declaring the right of this state to all lands laying within the boundaries therein mentioned.

WHEREAS the free citizens of this state, or in other words, the community thereof, are essentially the source of the sovereignty of the state, and no individual or body of men can be entitled to, or vested with any authority which is not expressly derived from that source, and the exercise or assumption of powers not so derived, become of themselves oppression and usurpation; which it is the right and duty of the people or their representatives to resist, and to restore the rights of the community so usurped and infringed.

AND WHEREAS, the will or constitution of the good people of this state is the only existing legal authority derived from the essential source of sovereignty, and is the only foundation of the legislative power or government thereof, and so far as that will or constitution expressly warrants, the legislature may go, but no further; and all constructive powers not necessarily deduced from that expressed will, are violations of that essential source of sovereignty, and the rights of the citizens, and are, therefore, of no binding force or effect on the state, or the good people thereof, but null and void.

AND WHEREAS, the last legislature of this state not confining itself to the powers with which that body was constitutionally invested, did usurp a power to pass an act on the seventh day of January, one thousand seven hundred and ninety-five, entitled "an act

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supplementary to an act entitled, an act for appropriating a part of the unlocated territory of this state, for the payment of the late state troops, and for other purposes therein mentioned, declaring the right of the state to the unappropriated territory thereof, for the protection and support of the frontiers, and for other purposes;" by which an enormous tract of unascertained millions of acres of the vacant territory of this state, was attempted to be disposed of to a few individuals, in fee simple, and the same is not only unfounded as being without express constitutional authority, but is repugnant to that authority, as well as to the principles and form of the government, the good citizens of this state have chosen for their rule, which is democratical, or a government founded on equality of rights; and which is totally opposed to all proprietary grants, or monopolies, in favour of a few, which tend to build up that destructive aristocracy, in the new, which is tumbling in the old world; and which, if permitted, must end in the annihilation of democracy and equal rights; those rights and principles of that government which our virtuous forefathers fought for, and established with their blood.

AND WHEREAS, the fourth section of the fourth article of the constitution of the United States declares, "The United States shall guarantee to every state in this union, a republican government," which could never have been intended to be a republican aristocracy, and which such extravagant grants tend to establish, the constitution of the United States, expressly, acknowledging a republican democracy, or the foundation of the people: it receiving all its force and power from their hands as their gift, which is manifest from its context, "We the people of the United States."

AND WHEREAS, as before mentioned the said usurped act is repugnant to the constitutional authority, inasmuch as that by the sixteenth section of the first article of the constitution of this state it is declared, "that the general assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the state, which

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shall not be repugnant to this constitution." And the said usurped act is opposed to the good of the state, and it is self-evident that the legislature which assumed the power, did not deem it for the good of the state.

1st. Because self-preservation, or the protecting itself is the greatest good, or first duty of every government, and has been shown, immense monopolies of land, by a few individuals, under the sanction of the government, is opposed to the principles of democracy, or the fundamental laws of the citizens of this state have chosen for their rule, which so far from being for the good or self-preservation of the democratical, or equal government, is most manifestly for its destruction and injury.

2d. Because the expression "good of the state" embraces the good of the citizens composing the state, and the good of the citizens consists in the peaceable pursuit of happiness, and the enjoyment of all rights natural, or acquired, not expressly delegated for the purposes of government; and a sale of such an enormous tract to a few speculators, which was and is the common right of all the good citizens of this state, is contrary to those rights, and, therefore, to their manifest injury, and of course to the injury of the state.

3d. Because even supposing constitutional authority to have been vested in the legislature, for the purpose of such disposal, the legislature was not vested with power to transfer the sovereignty and jurisdiction of the state over the territory attempted to be disposed of, which it has done by opening a door for a sale to foreign powers, and a relinquishment of the powers of taxation until the proprietors choose to be represented, which is, in fact, dismembering the state, and which transfer and relinquishment of taxation cannot be for the good of the state.

4th. Because there was no necessity or pressing urgency for the sale of such an immense tract of territory, equal to some European kingdoms, to carry into execution, and operation, the extinguishment of the Indian claims to the lands between the Oconee and Oakmulgee, contemplated by the act, entitled "An act for appropriating a part of the unlocated territory

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of this state for payment of the late state troops, and for other purposes therein mentioned;" the subterfuge on which the said usurped act of the seventh of January, one thousand seven hundred and ninety-five was founded, when the whole amount of the appropriation for that purpose was but thirty thousand dollars, and funds to a greater amount were then in the treasury unappropriated: and because no state or nation is justified in wantonly dissippating its property or revenues, and a legal alienation of which can only take place from the most pressing necessity; and the territory attempted to be disposed of, was the said usurped law valid, was wontonly dissipated, it being disposed of for the trifling sum of five hundred thousand dollars; a sum not adequate to the annual quitrents such lands were charged with, previously to the revolution of the British king; which wanton dissipation cannot be for the good of the state.

5th. Because exclusive of the immense loss of revenue to which the state is exposed from the relinquishment of taxation, the sum of five hundred thousand dollars was accepted as the consideration money for the sale, and the sum of eight hundred thousand dollars offered by persons of as large a capital, and as much respectibility and credit, and on terms more advantageous to the state, was refused; which, as it was, (should the said usurped act have been considered valid,) a clear loss of three hundred thousand dollars to the revenues of the state, it is evident that the law authorizing the sale was not deemed by the members of the legislature for "the good of the state," which must have consisted in obtaining the highest price and the most advantageous terms.

6th. For the very excellent reasons given by his excellency the governor, in his dissent to the first bill for the disposal of the said territory, delivered to the house of representatives, on the twenty-ninth of December, one thousand seven hundred and ninety-four, and which bill was not materially different from the act in question; and which reasons prove, that his excellency as a negative branch of the legislature, although he concurred in the law, did not deem it for

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"the good of the state," and which dissent was in the words following.

1st. I doubt whether the proper time is arrived for disposing of the territory in question.

2d. If it was the proper time, the sum offered is inadequate to the value of the land.

3d. The quantity reserved for the citizens is too small, in proportion to the extent of the purchase.

4th. That greater advantages are secured to the purchasers than to the citizens.

5th. That so large an extent of territory being disposed of to companies of individuals, will operate as monopolies, which will prevent or retard settlements, population and agriculture.

6th. That should such disposition be made, at least one-fourth of the lands should be reserved for the future disposal of the state.

7th. That if public notice was given, that the land was for sale, the rivalship in purchasers would most probably have increased the sums offered.

8th. The power given to the executive by the constitution, the duty I owe the community, and the sacredness of my oath of office, I flatter myself, will justify this dissent in the minds of the members of the legislature, and of my other fellow citizens.

And whereas the said usurped law passed on the seventh day of January, 1795, is also repugnant to the afore cited sixteenth section, inasmuch as it is repugnant to the seventeenth or subsequent section of the said first article, which declares: They, (the legislature,) shall have power to alter the boundaries of the present counties, and to lay off new ones, as well out of the counties already laid off, as out of the other territory belonging to the state. When a new county or counties shall be laid off out of any present county or counties, such new county or counties shall have their representation apportioned out of the number of representatives of the county or counties out of which, it or they shall be laid out, and when any new county shall be laid off in the vacant territory belonging to the state, such county shall have a number of representatives not exceeding three, to be regulated and determined

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by the general assembly:" And the territory disposed of not laying within the limits of any county already laid off, and a sale and grant thereof, should the said usurped law be deemed valid, having been made, it could not be defined the vacant territory belonging to the state, whereby the constitutional powers vested in the general assembly by the seventeenth section would be barred and prevented, and consequently the settlers on the territory sold be deprived of the constitutional right of representation, and is not only thus repugnant to the said sixteenth and seventeenth sections, but thereby and by the relinquishment of the right of taxation, until the settlers are represented, which they cannot constitutionally be, is also repugnant to the whole letter and spirit of the constitution, in operating as a direliction of jurisdictional rights, and a virtual dismemberment of the state.

And whereas in and by the articles of confederation entered into and finally ratified, on the first of March, 1781, by the then thirteen states of America, the territory within the limits of each of the said states, is to each of them respectively, confirmed and guaranteed, first by the second article, to wit: "Each state retains its sovereignty, freedom, and independence, and power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in congress assembled." And secondly, by the last clause in the second section of the ninth article, "No state shall be deprived of territory for the benefit of the United States," And in and by the first clause of the sixth article of the federal constitution of the United States, all engagements entered into before the adoption of the said constitution, shall be as valid against the United States, under the said constitution, as under the confederation:" And by the twelfth article of the amendments to the said constitution, ratified and adopted, "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

And whereas in and by the definitive treaty of peace, signed at Paris, on the third of September,

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1783, the boundaries of the United States were established, and the United States fully recognised and acknowledged, by the first article thereof, in the words following; "His Britannic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia, to be free, sovereign, and independent states, that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the government, proprietary and territorial rights of the same;" and by the second article it is declared; "And that all disputes which might arise in future on the subject of the boundaries of the United States, may be prevented, it is hereby agreed that the following are and shall be their boundaries." And those boundaries thereby declared, which limit the westwardly and southwardly parts of this state, are thus defined: "Along the middle of the Mississippi until it shall intersect the northernmost part of the thirty-first degree of north latitude; south by a line drawn due east from the termination of the line last mentioned, in the latitude of thirty-one degrees north of the equator, to the middle of the River Apalachicola or Chatahouchee; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River; and thence along the middle of St. Mary's River to the Atlantic Ocean;" and the King of Great Britain did, by proclamation, dated the seventh day of October, in the year 1763, annex to the then province of Georgia, all the lands laying between the said River St. Mary's and the Alatamaha, its former boundary, claimed by South-Carolina under her charters; and the state of South-Carolina, in and by a convention held and concluded between the commissioners of the said states, at Beaufort, under the authority and articles of the confederation, on the twenty-eighth of April, 1787, did confirm to the state of Georgia, the southward and westwardly boundaries described in the said treaty of Paris, by cession and relinquishment of all right, title and claim, which the said state possessed from the original char-

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ter thereof, to the government, sovereignty and jurisdiction in and over the same, and also the right of pre-emption of the soil from the native Indians, and all other the estate, property and claim, in or to the said land; and the boundaries so described also coincide with the boundaries of this state, described by the land act of this state now in force, passed at Savannah, the 17th of September, 1783, (except as to the northern boundary of the state,) which by the said convention is thus established, and ratified by the first article thereof: "The most northern branch or stream of the River Savannah, from the sea or mouth of such stream, to the fork or confluence of the Rivers now called Tugaloo or Keowee, and from thence to the most northern branch or stream of the said River Tugaloo, till it intersects the northern boundary line of South-Carolina, if the said branch or stream of Tugaloo extends so far north; reserving all the islands in the said Rivers Savannah and Tugaloo, to Georgia; but if the head spring or source of any branch or streams of the said River Tugaloo, does not extend to the north boundary of South-Carolina, then a west line to the Mississippi."

And whereas until the formation of the confederation, there could possibly belong no territorial rights to the United States, nor after such formation within the chartered limits of any state, but such as were specially ceded and relinquished by the respective states; and the people of the state of Georgia have by no act of theirs, or in any manner or shape whatever, transferred or alienated or delegated a power to transfer or alien the territory attempted to be disposed of by the said usurped act, passed on the seventh of January, in the year one thousand seven hundred and ninety-five, and the same and every part thereof is hereby declared to be vested in the state and people thereof, and inalienable, but by a convention called by the people for that express purpose, or by some clause of power expressed by the people, delegating such express power to the legislature in the constitution.

And whereas, divested of all fundamental and constitutional authority, which the said usurped act might

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be declared by its advocates and those who claim under it, to be; founded on, fraud has been practised to obtain it, and the grant under it. And it is a fundamental principle both of law and equity, that there cannot be a wrong without a remedy, and the state, and the citizens thereof, have suffered a most grievous injury, in the barter of their rights by the said usurped act and grants, and there is no court existing if the dignity of the state would permit her entering one, for the trial of fraud and collusion of individuals, or to contest her sovereignty with them, whereby the remedy for so notorious an injury could be obtained: and it can no where better lay than with the representatives of the people chosen by them, after due promulgation by the grand juries of most of the counties of the state, of the means practiced and by the remonstrances of the people to the convention, held on the tenth day of May, one thousand seven hundred and ninety-five, setting forth the atrocious speculation, corruption and collusion, by which the said usurped act and grant were obtained.

And whereas the said petitions and remonstrances of the good people composing the state, to the said late convention held at Louisville, on the said tenth of May, one thousand seven hundred and ninety-five, produced a resolution of that body in the following words: "*Resolved*, That it is the opinion of this convention, from the numbers, respectability, and ground of complaint stated in the sundry petitions laid before them, that this is a subject of importance meriting legislative deliberation. *Ordered, therefore*, That such petitions be preserved by the secretary, and laid before the next legislature at their ensuing session." Which resolution invests this legislature with conventional powers, *quoad hoc*, or in common terms, for the purpose of investigating the same, and which gives additional validity to legislative authority, were the powers of one legislature over the acts of another to be attempted to be questioned.

And whereas it does appear from sundry affidavits, and a variety of proofs satisfactory to this legislature, as well as from the presentments of the grand juries

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on oath, of a considerable majority of the counties of the state, and by the afore-recited petitions and remonstrances of the good people thereof to the convention, and by numerous petitions to this present legislature, to the same purport, as also from the self-evident proof of fraud, arising from the rejection of eight hundred thousand dollars, and the acceptance of five hundred thousand dollars, as the consideration money for which the said territory was sold; that fraud and corruption were practised to obtain the said act and grants, and that a majority of those members of the legislature who voted in favour of the aforesaid act, were engaged in the purchase; and a majority of one vote only appeared in favour of the said usurped act in the senate, and on which majority in that branch the same was passed, and corruption appears against more than one member of that body; which, exclusive of the many deceptions used, and the inadequacy of price for such an immense and valuable tract of country, would be sufficient in equity, reason, and law, to invalidate the contract, even supposing it to be constitutional, which this legislature declares it is not.

Be it therefore enacted, That the said usurped act, passed on the seventh day of January, in the year one thousand seven hundred and ninety-five, entitled "an act supplementary to an act entitled an act, for appropriating a part of the unlocated territory of this state, for the payment of the late state troops, and for other purposes therein mentioned; declaring the right of this state to the unappropriated territory thereof, for the protection of the frontiers, and for other purposes," be and the same is hereby annulled, rendered void, and of no effect: and as the same was made without constitutional authority, and fraudulently obtained, it is declared of no binding force or effect on this state or the people thereof; but is and are to be considered both law and grant as they ought to be *ipso facto* of themselves void, and the territory therein mentioned is also hereby declared to be the sole property of the state, subject only to the right of treaty of the United States, to enable the state to purchase under its pre-emption right the Indian title to the same.

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And be it further enacted, That within three days after the passing of this act the different branches of the legislature shall assemble together; at which meeting the officers shall attend with the several records, documents and deeds in the secretary's and surveyor-general's and other public offices, and which records and documents, shall then and there be expunged from the face and indexes of the books of record of the state, and the enrolled law or usurped act shall then be publicly burnt, in order that no trace of so unconstitutional, vile and fraudulent a transaction, other than the infamy attached to it by this law shall remain in the public offices thereof; and it is hereby declared the duty of the county officers of record, where any conveyance, bond or other deed whatever, shall have been recorded, relating to the sale of the said territory, under the said usurped act, to produce the book wherein the said deed, bond or conveyance may be so recorded, to the superior court at the next session of the court after the passing this law, and which court is hereby directed to cause said clerk or keeper of the public records of the court to obliterate the same in their presence; and if such clerk or keeper of records, neglect or refuse so to do, he shall be, and is hereby declared incapable of holding any office of trust or confidence in this state, and the superior court shall suspend him: And from and after the passing of this act, if any clerk of a county, notary public or other officer keeping record, shall enter any transaction, agreement, conveyance grant, law or contract, relative to the said purchase under the said usurped act on their books of record, whereby claim can be derived of authority of record, he or they shall be rendered incapable of holding any office of trust or profit within this state, and be liable to a penalty of one thousand dollars, to be recovered in any court within and under the jurisdiction of this state; one half whereof to be given for the benefit of the informer, and the other half to be lodged in the treasury for the use of the commonwealth.

And be it further enacted, That the said usurped law passed on the 7th of January, in the year 1795, shall

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not, nor shall any grant or grants issued by virtue thereof; or any deed or conveyance, agreement or contract, scrip or paper relative thereto, be received as evidence, in any court of law or equity of this state, so far as it establishes a right to the said territory or to any part thereof: *Provided*, That nothing herein contained shall be construed to prevent such deed or conveyance, agreement or contract between individuals, scrip issued by the pretended purchasers, or other paper, from being received as evidence in private actions for the recovery of any moneys, or other interest given, paid or exchanged, as the consideration for pretended sales by the original pretended purchasers or persons claiming and selling by and under them.

And be it further enacted, That his excellency the governor, be, and he is hereby empowered, and required to issue warrants on the treasury after the expiration of sixty days in favour of such persons as may have *bona fide* deposited moneys, bank bills or stock in the funds of the United States or warrants, in part or in whole payment of pretended shares, of the said pretended purchased territory: *Provided*, the same shall be now therein and not otherwise: *And provided also*, That the risque attending the keeping the sum or sums so paid in, be deemed and is hereby declared, to lay entirely with the persons who deposited them, and that any charge of guards or other expenses for the safe keeping thereof, be deducted; and in case of neglect of application to his excellency therefor, within eight months after the passing of this act, the same shall be, and is hereby deemed property derelict, and escheated to and for the use of this state.

And be it further enacted, That any pretended power assumed, or intended by the said act, or any clause or letter of the same, or which may or can be construed to that purpose by the said usurped act, grants under it, or from the journals of the house of senate, or representatives, to apply to the government of the United States for the extinguishment of the Indian claims to the lands within the boundaries in the said usurped act mentioned, so far as may affect the rights of this state to the lands therein described,

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is and are hereby declaring null and void, and the right of applying for, and the extinguishment of Indian claims to any lands within the boundaries of this state, as herein described, being a sovereign right, is hereby further declared to be vested in the people of this state, to whom the right of pre-emption to the same belongs, subject only to the controling power of the United States to authorize any treaty or treaties for and to superintend the same.

And be it further enacted, That in order to prevent future frauds on individuals as far as the nature of the case will admit, his excellency the governor is hereby required, as soon as may be, after the passing of this law, to promulgate the same throughout the United States.

Concurred 13 *February*, 1796.

THOMAS STEPHENS.
Speaker of the house of Representatives.

BEN. TALIAFERRO,
President of the Senate.

JARED IRVIN,
Governor of Georgia.

Secretary's office, Louisville, 14 *March*, 1696.

I do certify the foregoing to be a true copy from the original laws deposited in this office.

J. MERIWHETHER, FOR
JOHN MILTON, Sec.

No. XV.

Resolved, that it be, and hereby is, represented to the state of North-Carolina and Georgia, that the lands which have been ceded by the other states in compliance with the recommendations of this body, are now selling in large quantities for public securities; that the deeds of cession from the different states have been made without annexing an express condition that they should not operate till the other states, under like circumstances made similar cession; and that congress have such faith in the justice and magnanimity of the States of North-Carolina and Georgia, that they only think it necessary to call their attention to these circumstances, not doubting but upon

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consideration of the subject, they will feel those obligations which will induce similar cessions, and justify that confidence which has been placed in them.

October 20th, 1787., Jour. Congress, vol. 12. 210.

No. XVI.

Extract of a communication, submitted by Mr. Pinckney, the American Minister at Madrid, to the prince of peace, in the course of the negociations for the late treaty, dated the 10th of August, 1795, viz.

"Thirty-two years have elapsed since all the country on the left, or eastern bank of the River Mississippi, being under the legitimate dominion of the then King of England, that sovereign thought proper to regulate, with precision, the limits between the provinces of Georgia and of the two Florida's, which was done by his solemn proclamation, published in the usual form; by which he established, between them, precisely the same limits, which, nearly twenty years after, he declared to be the sourthernly limits of the United States, by the treaty which this same King of England concluded with them in the month of November, 1782.

No. XVII.——CASE.

The legislature of the State of Georgia, by an act of the 7th January, 1795, directed a sale to be made of a certain tract of land, therein described to James Gunn and others, by the name of the Georgia Company, upon certain conditions therein specified. The sale was made pursuant to the act: the conditions of sale were performed by the purchasers, and a regular grant made to them, accordingly, of the said tract of land. Subsequent thereto, the said legislature has passed an act, whereby, on the suggestion of unconstitutionality, for various reasons, (prout the act,) and also of fraud and corruption, in application to the legislative body, the first act, and the grants thereupon, are declared null and void.

On the foregoing case, the opinion of counsel is desired, whether the title of the grantees and their assigns, the latter being *bona fide*, purchasers of them, for valuable considerations, be valid? Or, whether the last mentioned act be of force to annul the grant?

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ANSWER.

Never having examined the title of the State of Georgia to the lands in question, I have no knowledge whether that state was, itself, entitled to them, and in capacity to make a valid grant. I can, therefore, have no opinion on this point. But, assuming it, in the argument, as a fact, that the state of Georgia had, at the time of the grant, a good title to the land, I hold that the revocation of it is void, and that the grant is still in force.

Without pretending to judge of the original merits or demerits of the purchasers, it may be safely said to be a contravention of the first principles of natural justice and social policy, without any judicial decision of facts, by a positive act of the legislature, to revoke a grant of property regularly made for valuable consideration, under legislative authority, to the prejudice even of third persons, on every supposition, innocent of the alledged fraud or corruption; and it may be added, that the precedent is new, of revoking a grant on the suggestion of corruption of a legislative body Nor do I perceive sufficient ground for the suggestion of unconstitutionality in the first act.

In addition to these general considerations, placing the revocation in a very unfavourable light, the constitution of the United States, article first, section tenth, declares that no state shall pass a law impairing the obligations of contract. This must be equivalent to saying, no state shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a state or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me, that taking the terms of the constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia, may justly be considered as contrary to the constitution of the United States, and, therefore null; and that the

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courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so.

(Signed) ALEX. HAMILTON.

March 25, 1795.

George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, and so forth.

To our trusty and well beloved James Wright, Esquire, Greeting:

WHEREAS we did, by our letters patent, under our great seal of Great Britain, bearing date at Westminster, the fourth day of May, in the first year of our reign, constitute and appoint you, the said James Wright, Esquire, to be our Captain-General and Governor in Chief, in and over our colony of Georgia, in America, lying from the most northern stream of a river, there commonly called Savanna, all along the sea coast to the southward into the most southern stream of a certain other great water or river, called the Alatamaha, and westwardly from the heads of the said rivers respectively, in a direct line to the South Seas, and all that space, circuit or precinct of lands lying within the said boundaries, with the islands in the sea, lying opposite to the east coast of the said lands, within twenty leagues of the same, during our pleasure, as by the said recited letters patent. Relation being thereunto had, will more fully and at large appear.

Now, KNOW YE, that we have revoked and determined, and by these presents do revoke and determine such parts and so much of the said recited letters patent, and every clause, article, and thing therein contained, which doth any way relate to or concern, the limits and bounds of our said province, as above described. And, further, know you, that we, reposing special trust and confidence in the courage and loyalty of you, the said James Wright; of our special grace, certain knowledge, and mere motion, have thought fit to constitute and appoint, and by these presents do constitute and appoint, you the said James Wright, to be our Captain-General and Governor in Chief, in and over our colony of Georgia, in America, bounded on the north

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by the most northern stream of a river there commonly called Savanna River, as far as the head of the said river, and from thence westward as far as our territories extend on the east of the sea coast, from the said River Savanna to the most southern stream of a certain other river, called St. Mary, including all islands within twenty leagues of the coast, lying between the said Rivers Savanna and St. Mary's, and on the south, by the said River St. Mary, as far as the head thereof, and from thence westward as far as our territories extend, by the north boundary line of our province of East and West-Florida. And we do hereby declare, ordain, and appoint, that you, the said James Wright, shall and may hold, execute, and enjoy the office and place of our Captain-General and Governor in Chief, in and over our colony of Georgia, limited and bounded as above described, together with all and singular the power and authority, contained in our said recited letters patent, under our great seal of Great Britain, bearing date at Westminster, the 4th of May, in the first year of our reign, excepted as herein excepted, for and during our will and pleasure.

In witness whereof, we have caused these our letters to be made patent.

Witness our seal, at Westminster, the 20th of January, in the fourth year of our reign.

York and York.

By writ of privy seal.

Stamp XL. Shields.

Great seal of Great Britain.

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THE

AMERICAN LAW JOURNAL.

SOUTH-CAROLINA: DISTRICT COURT.

Joseph Almeida, Captain of the American privateer schooner *Caroline*, v. *Certain Slaves.**

July, 1814.

[Slaves captured in time of war, cannot be libelled as prize: nor will the District Court of the United States consider them as prisoners of war. The Court considers the disposition of them as a matter of state, in which it is not fit that the judiciary should interfere.]

DRAYTON, J. The libel in this case alleges, that during the cruise of the said privateer, on the high seas, she captured certain slaves, "the property of the King of the United Kingdom of Great Britain and Ireland, and the dependencies thereof; or, of the subjects of the said king." That in and by a certain act of the congress of the United States, passed the 26th June, 1812, entitled "An act concerning letters of marque, prizes, and prize goods," it is among other things en-

* From the manuscript communicated by Judge Drayton.

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acted, that all captures of vessels, and property, shall be forfeited, and accrue to the owners, officers, and crew of the vessels, by which such prizes shall be made; reserving to the United States, two per centum, on the net amount of the moneys arising from such captures—and concludes with the usual prayer of condemnation.

In behalf of the United States, a claim was interposed by the district attorney, for the said slaves, *as prisoners of war, or otherwise*, to them the said United States belonging; denying the right of the said Joseph Almeida, to the said slaves, as prize of war; and concluded with praying, that the said slaves may be adjudged and delivered to them as *prisoners of war, or otherwise*, and that the costs of their claim be allowed.

This is one of the new and important questions, arising from the present war; in which the United States of America are engaged with Great Britain. The court has, heretofore, not proceeded to condemnation of slaves, brought in as prize of war; but, has ordered their confinement as prisoners. And in some cases, they have been received as such, by the British authority resident at this city. The interests of parties, however, require, at this time, a formal decision on the point of prize; to obtain which, the libel, in this case, has been filed.

It is contended by *Hayne*, for the libellant, that by a true construction of the rights of war, and particularly in pursuance of the prize act of the United States, specially referred to in the libel, *all captures* and *prizes* of *vessels* and *property*, shall be forfeited and accrue to the owners, officers, and crews of the vessels making such captures. That negroes and persons of colour, held in slavery by the British, are as much slaves, as those held in slavery by our own citizens. That they are not real, but *personal property*; considered as assets in sales, and in distribution of estates. And, therefore, they come within the meaning of the word *property*, as mentioned in the 4th section of the said act: (11 vol. Laws U. S. 240.) and, consequently, are liable to condemnation as prize. That the law must be so construed, not only as respects the public interests, and the intention of congress, in passing the prize act:

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but, as protecting the rights of all concerned in privateering; and, as encouraging the exertions of our citizens to attack and injure the enemy. And more particularly so, in retributive justice; as the enemy have taken many salves belonging to our citizens, and have appropriated them to their own use, as prize of war.

On the part of the United States, it is insisted, by *Parker*, (District Attorney,) that the right of condemning the slaves as prize of war, does not attach in favour of libellants: but, that they must be considered as *prisoners of war or otherwise*, in behalf of the United States. Because, other than such a construction, would be at variance with the act of congress, passed on the 2nd March, 1807, prohibiting the importation of slaves. —(8 vol. Laws U. S. 262.) That slaves cannot be considered as *property*, under that term, in the prize act: because, it could not have been the intention of congress to consider them as prize, springing out of the events of the war. For, were this the meaning of the legislature, the act prohibiting the importation of slaves, would have been repealed, so far as it had any collision with the war, or the prize acts.

I have never had any doubt on this subject. But, as those interested in such captures, appear not satisfied, by a non-judicial divestment of what they claim as a right, it is better that the question should at length be seriously brought before me.

Did the question turn upon the meaning of the word *property*, as relating to slaves; something might be said in support of such doctrine: not only, upon the principle of the civil law which considers *slaves* not as persons but as *things*; (1st Brown's civil law, 100, 101, 103,) but also, from the custom, usage and meaning in law, of those of our States, possessing this property.—But, as only one portion of our union, permits this property in slaves, it cannot be supposed the other would in a general law, intend it was to be considered as prize. These two different interests are represented in congress; it is the united votes of that body, which have passed the prohibitory act. And it is but reasonable to believe those not permitting slavery, did not, and would not, concur, in such a construction, as is contended for, by libellant.

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But, there are stronger reasons, why a condemnation in favour of the captors, should not be decreed. In, the first place, the act prohibiting the importation of slaves, was made by congress, with the evident intention, of for ever thereafter preventing this importation. This act was passed to take effect at the earliest period (1st January, 1808,) at which the constitution of the United States, permitted congress to prohibit their importation. For until that time, the States interested in negro importation, would not have been controled but by their own acts. And congress having so early used such prohibitory power evinces their disapprobation of such commerce, and of adding to the number of slaves in the Union: and of course, their determination to maintain such prohibition strictly It is true, this law was made in time of peace, it was not a war measure. But, it does not thence follow, that it is to be superseded, or repealed by a declaration of war; or by the passage of a prize act. It does not follow, that an act passed as a general and standing municipal law, shall be repealed by a prize act, brought into existence, for the purposes of a particular war; unless such repeal manifestly appears. It would argue a want of caution in our legislature, which ought not to be supposed. The first section of the law is general and imperative. It enacts "That from and after the 1st day of January, 1808, it shall not be lawful, to import or bring into the United States, or the territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to service or labour." This section, therefore, is general; it applies to all vessels, whether of war or otherwise. For, "*ubi lex non distinguit, nec nos distinguere debemus.*" It is also imperative; being without any condition, or exception.—This further appears, by perusing the different sections of the act—as where the public interests required, the general bearing of the first section should be controled or mitigated, there the act is not silent, but declares in what manner it shall be done. So by the 7th section, permitting the

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capture, and bringing in of any ship or vessel hovering on our coasts, having on board any negro, mulatto, or person of colour, for the purpose of selling them as slaves; or with intent to land the same, in any port or place within the jurisdiction of the United States. (8 vol. Laws U. S. 266.) But even in this case, those persons are not to be sold; they are to be disposed of otherwise, as therein is directed.—The party capturing, receives nothing from the proceeds of such negroes, mulattos or persons of colour; his emoluments arise *only*, from the proceeds of the ship or vessel, her tackle, apparel and furniture, and the *goods* and *effects*, on board; and this under a *special proviso*, that to *entitle him* to such reward, he shall "keep safe every negro, mulatto, or person of colour, found on board of any ship or vessel, so seized, taken or brought into port for condemnation, and shall deliver every such negro, mulatto, or person of colour, to such person or persons, as shall be appointed by the respective states, to receive them &c." Hence, as respects the rights and interests vested by the prize act, congress has legislated with caution. When to give energy to that act, that body meant former acts, or parts of acts to be repealed, the same has been *expressly enacted;* it has not been left to a court, to advance one step farther, than was intended; by its decreeing a *virtual repeal.* For, it is only under such a decree, or, by such a construction, that the cause of the libellant can be sustained. This is evident, by referring to the 14th and 16th sections of the prize act; which for the purpose of giving free scope to its operations, *expressly*, repeal so much of the non-importation and embargo laws, as relate to *prize goods, or private armed vessels:* but, nothing is said as to the prohibitory slave act. It follows then, that congress did not intend to repeal such act, as relating to prize of war: as "Exceptio probat regulam, in non exceptis." And slaves, are not considered therein under the term *property*, or as *goods* and *effects:* as is evident by the remunerating clause, of the prohibiting slave act, (Sec. 7.) before mentioned. Congress has therein clearly expressed its opinion on

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this point; and it is not then for this court, to suppose a different construction.'

I am, therefore, of opinion, the negroes or persons of colour, so libelled, cannot be condemned as prize to the captors.

The only question now remaining for consideration, is whether the claim in behalf of the United States, for the same; as *prisoners of war or otherwise*, shall be sustained or, if not sustained, whether this court, will, in any, and what manner, pronounce judgment in the premises?

As to the claim of prisoners of war, I do not think it proper to decide thereon. It appears to me, as the laws of the United States, are silent on the subject; it becomes a *matter of state:* respecting which, *it is* not for the judiciary to determine.—The right to do so, remaining with the government of the United States. Because, these persons may have been heretofore informally considered as prisoners; it is no reason this court should now decree them to be prisoners of war. And on this point, there is much similarity, with the reasoning and cases in law, respecting *Head money.* In which the court of admiralty pronounces not whether due; but *only* the number of men taken: leaving the remuneration to the *Sovereign power.* (1st Robinson's Admiralty Reports 157.)

Under these impressions, I do adjudge and decree, that the libel be dismissed with costs. And, that the claim of the United States, be sustained, so far, as to detain the said negroes, mulattoes, or persons of colour, in the possession and custody of the marshal; subject to such disposition and uses, in favour of the United States, whether as prisoners of war, as prize to the United States, or otherwise, as shall lawfully be declared, and directed in the premises. And lastly, I adjudge and decree that the libellant pay also the costs of the claim, in this case.

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Habeas Corpus.

SUPREME COURT OF PENNSYLVANIA.

Case of LEWIS *a black man claimed as the slave of Langdon Cheves, Esq.*—Before M. KEPPELE, Esq. an Alderman of the city of Philadelphia.

The warrant in this case was issued upon the oath of LANGDON CHEVES, Esq. in the words following:

"LANGDON CHEVES being duly sworn, deposeth and saith, that he is a citizen and resident of the state of South-Carolina—that he was born in the said state, and hath never resided in any other state or country but as a sojourner. That during his stay in the state of Pennsylvania, at several times in and since the year 1811, he only sojourned therein, and had not any intention to become domiciled, or otherwise to reside therein, than as a sojournor. That during the several periods of his stay as aforesaid in the said state, he was a member of the house of representatives of the United States—and that he sojourned in the said state for the purpose of more conveniently discharging his duties as a member of congress. That the negro man Lewis, who was in his service as a domestic servant during his stay in Pennsylvania, is now, and was during all the time and times of his stay in the said state as aforesaid, his slave—and that he acquired him by purchase in the state of South Carolina, according to the laws and usages thereof. That the said Lewis absconded from the service of this deponent in Germantown, in the state of Pennsylvania, on or about the first day of the present month of December—and hath since continued absent from the service of the deponent without his leave or consent, and against his will and orders.

(Signed) LANGDON CHEVES.

17th December, 1813.

N. B. The deposition was sworn to before the mayor of the district of Columbia, Washington City.

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It is also stated, and not controverted, that some time in the month of March last, after the termination of the session of congress, Mr. Cheves came from Washington to the state of Pennsylvania, bringing Lewis with him. Mr. Cheves rented a house in Germantown, and, with his family, lived in it until some time in the present month, when he gave up the house in Germantown, and went to Washington to attend in his place as a member of the congress of the United States. And that Lewis lived with him in Pennsylvania more than six months, but absconded from Mr. Cheves before he left this state for Washington.

JOHN SERGEANT,
Attorney for Langdon Cheves.

The within and foregoing facts are agreed to—*28th* Dec. 1813

On behalf of Lewis.

WM. MASTER.

ALDERMAN KEPPELE'S OPINION.

The opinion to be delivered, depends upon the construction of an act of assembly passed the 1st day of March, 1780, which in the tenth section provides, that "No man or woman of any nation or colour, (except the negroes or mulattoes, who shall be registered as aforesaid,) shall at any time hereafter be deemed, adjudged, or holden within the territories of this commonwealth, as slaves or servants for life, but as free men and free women, except—

"The domestic slaves attending upon delegates in congress from the other American states.

"Foreign ministers and consuls.

"And persons passing through or sojourning in this state, and not becoming resident therein.

"And seamen employed in ships not belonging to any inhabitant of this state, nor employed in any ship owned by any such inhabitant."

Provided such domestic slaves be not alienated or sold to any inhabitant: nor, *except in the case of members of congress foreign ministers and consuls*, retained in this state longer than six months.

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It is contended, that "under this act, and under a provision contained in the second section of the supplementary act passed the 29th March, 1788, (which will be considered hereafter,) the defendant is free."

The exceptions contained in the act of March, 1780, refer to *different* descriptions of persons, whose property is saved from its operation, viz:

1. Domestic slaves attending upon delegates in congress, foreign ministers and consuls.

2. Persons passing through, or sojourning in the state, and not being resident therein.

3. Seamen employed in ships owned by foreigners, &c.

If the case rests upon the section quoted, unconnected with any other law, Mr. Cheves being a delegate in congress from South-Carolina, and having the defendant as his domestic slave attending him, does not forfeit his claim to him *as a slave*, from his residence in Pennsylvania exceeding the term of six months.

The observation made that this act was passed when congress sat in this city, has not that weight with me which the defendant's counsel has been disposed to ascribe to it—the words are general and descriptive of the character of the person, without having reference to the place at which congress convene and hold their sessions.

If within six months a member of congress should be taken sick, so as to render it impossible for him to prosecute his journey, and that his indisposition should continue beyond the six months, according to the doctrine advanced for defendant, he is free. This never could have been intended by the legislature, and indeed the phraseology used in the last part of the section, seems to put the point beyond a doubt. The words are, "except in the case of members of congress," &c. omitting the former words "*attending upon*," and referring to the "*descriptio personarum*" exclusively.

Foreign ministers and consuls have had their residences and establishments in this city ever since the passing of the act, and have had their domestic slaves with them—it never was contended that *their* slaves became

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free after a residence of six months; so far from it, it has been *expressly conceded* that the property of ministers and consuls to *their* slaves is protected and secured by the act.

The admission is conclusive—because, by the act, "members of congress, foreign ministers and consuls," are placed upon the same footing, and the *same* principle which is applicable to the one, extends to the *rest.* No reason can be assigned for giving a preference to the claims of ministers representing *foreign* courts, to those of the *representatives of the American people* attending upon congress—reasons might be given for placing members of congress *first* on the list; and the circumstances of the present times evince the propriety of what was done by the legislature *in placing* them *at least* upon an equality with *foreign ministers and consuls.*

Mr. Cheves could not remove himself and his domestics in safety to South Carolina by sea, as the coast was infested by the enemies of the United States; if he went by land, it might take up nearly the whole period to perform his journey.

Suppose the case of a member of congress from the territory of Lousiana. In ordinary times he could not perform the journey by land within six months—and situated, as our nation now is, being at war with certain Indian tribes to the south, he could not perform it with safety at all.

The language addressed is this—"go home with your slave"—If the mandate be obeyed, the member's *life* as well as *property* is in jeopardy. "Stay if you please;" if the invitation be accepted, his *life* may be saved but his *property* is lost. Whether the legislature intended to place members of congress in this dilemma, is left for others to decide.

It now remains to consider the act of the 29th March, 1788, herein before referred to.

The 2d section of the act, is corroborative of the position assumed.

It provides, (making use of the words of the former act,) "that the exception contained in the 10th section of the act of the 1st March, 1780, relative to

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the domestic slaves *attending upon persons passing through or sojourning in this state*—and not becoming resident therein—shall not be deemed or taken to extend to the slaves of such persons as are inhabitants of or resident in this state, or who *shall come here* with an intention to settle and reside,"&c.

This section is conclusive—The exception contained in the 10th section of the act of March, 1780, as to slaves attending upon delegates in congress from the other American states—foreign ministers and consuls *is skipped over and omitted*, leaving the case as explained and modified operative upon sojourners,&c.—*other than* members of congress, public ministers, and consuls,

It is worthy of remark, that the act of March, 1788, was passed while *congress sat in New-York.*

If the legislature had contemplated to lessen or impair the rights of *members of congress, foreign ministers and consuls*, to the services of *their* slaves, it is difficult to conceive why a provision to that effect was not introduced. The omission implies—that no interference with *their rights* was intended—and the guarded manner in which the act is couched, shows that *members of congress, foreign ministers and consuls*, were to be exonerated from its operation.

The act of March, 1780, being considered as the law, applicable to this case, I have no hesitation in declaring it as my opinion, that Mr. Cheves has not forfeited his right to the services of the defendant, (as his slave,) by his residence in the state beyond six months. And I feel as little reluctance in saying that a member of congress is entitled to the services of his slave during the period for which he is elected.

If wrong in the opinion as delivered, it gives me consolation to know that it is the subject of a *speedy* revision.—The supreme court is now in session—and an habeas corpus can be applied for immediately—That the case is important and involved in some difficulty, is admitted—and that both parties are desirous of having the point finally settled by the *highest tribunal*, is evinced by the readiness with which the

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facts have been agreed upon—leaving the *question of law only* for the consideration of the court.

The order is, that the defendant return to his master's service—and in case of refusal, *he must be committed.*

An *habeas corpus* was applied for and granted, and the case was argued before the supreme court on Monday last.

John Sergeant, Esq. appeared as counsel for Mr. Cheves—and Wm. Lewis and William Rawle, Esqrs. as counsel for the negro claimed as a slave.

The court, after argument, postponed their decision until Tuesday—when the following opinion was delivered.—

Tilghman, Ch. J. Negro Lewis, who is brought before us on this habeas corpus, was committed by Alderman Keppele, as the slave of Langdon Cheves, Esq. having absconded from his master's service. Mr. Cheves is a member of the house of representatives of the U. S. from the state of South Carolina, and has never resided in this state, except as a sojourner. During the recess of congress, he remained with his family in a house which he rented in Germantown, in this state. Lewis was his slave, and employed as a domestic servant in his family, during his stay in Germantown, for more than six months, between March and December last. It is contended, that in consequence of this residence, Lewis acquired his freedom by virtue of the act "for the gradual abolition of slavery," passed the 1st March, 1780. The question depends on the 10th section of the act, by which it is enacted, that "no man or woman of any nation or colour, except the negroes or mulattoes, which shall be registered as aforesaid, shall, at any time hereafter, be deemed, adjudged, or holden, within the territories of this commonwealth, as slaves or servants for life, but as free men and free women, *except the domestic slaves attending upon delegates in congress from the other American states*, foreign ministers and consuls, and persons passing through or sojourning in this state,

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and not becoming resident therein, and seamen employed in ships not belonging to any inhabitant of this state, nor employed in any ship owned by any such inhabitant: Provided, such domestic slaves be not alienated or sold to any inhabitant, nor (except in the case of members of congress foreign ministers and consuls) retained in this state longer than six months." The plain meaning of this section appears to be, that the domestic slaves attending upon members of congress, (other than members from Pennsylvania,) are excepted from the general provision which confers freedom. But, several ingenious arguments have been urged to prove that this act has a more refined and less obvious meaning. First of all it is said, that having been passed before the adoption of the present federal constitution, it can have no application to the congress under the present constitution. I cannot perceive the force of this objection. To be sure, the congress of the United States under the old confederation, are, in many respects, different from the present congress; but the object and foundation of both is the same—they are both founded on a *federative union*, and the object of both is the general defence and welfare—both require that the members representing the several states should meet at some one place, and it is as necessary that the members, from the sourthern states, in the present congress, should be attended by their domestics, as it was for the members of the old congress. In fact, I do not recollect to have heard of this distinction before; and considering that congress sat ten years in this city under the present constitution, during all which time the members from the southern states were attended by their slaves, without molestation, there is strong reason for supposing that the construction now contended for is contrary to that which has been generally received, and that it is contrary to the construction of our own legislature, appears from the 3d section of the act "to explain and amend the act for the gradual abolition of slavery" passed 29th March, 1788, (a few months after the present federal constitution had been ratified by this state.) In this section it is enacted, "that no negro

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or mulattoe slave, (except as in the last exception of the 10th section of the original act is excepted,) shall be removed out of the state. Now the last exception in the 10th section, relates to *members* of *Congress*, foreign ministers and consuls, so that the proviso in their favour was considered as still in force. The next position of the counsel for the hab. corp. is that our act is confined to the members of congress, *during the time of its session*, allowing a reasonable time for going and returning. The expression of the act is, *delegates in congress*—but I take this to be the same as *delegates to congress*, or in other words, *members of congress*—and that this is the meaning of the law, is certain, because in the proviso in the last part of the same section, *members of congress*, are the words *used*. It is next contended, that whatever may be the literal meaning of the words, the real object of the law, was to give to members of congress the benefit of their slaves during the time of their attendance on their public duty, *only*—I agree that it is fair to construe the law according to its meaning, provided that meaning is deduced not from conjecture, but from the words of the law. At the same time I am not for adhering to *words* so far as to produce consequences too absurd, or inconvenient, to be supposed to have been intended by the legislature. But I see no absurdity or inconvenience in giving to these words their obvious meaning, which will only confer on members of congress the privilege of being served by their domestics during the time that they remain members, whether congress shall be sitting in this or any other state—On the contrary, I see great inconvenience in reducing the southern members to the necessity of giving up their residences in this state during the recess of congress, or losing the service of their domestics. In the case of Mr. Cheves, this inconvenience would be very great indeed—because there was a session of congress between March and December, his return to Charleston, by water was cut off, and it was impossible to say whether the events of the war might not have induced the president of the United States to convene the congress before the month of December.

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We all know that our southern brethren are very jealous of their rights on the subject of slaves, and that their union with the other states could never have been cemented without yielding to their demands on this point; nor is it conceivable that the legislature of Pennsylvania could have intended to make a law, the probable consequence of which would have been, the banishment of congress from the state. I am, therefore, of opinion, that the true construction of the law, is that which is impressed on the mind by its first reading—that is to say, that the domestic slaves of members of congress who are attending on the family of their masters, even during its recess, gain no title to freedom, although they remain in the state more than six months, whether the seat of congress be in Pennsylvania or elsewhere. According to this construction, the prisoner is to be remanded to the custody of the gaoler.

YEATES, J.—The present case appears to me to be clearly within the words and spirit of the exception contained in the 10th section of the act of the first of March, 1780. Mr. Cheves *is a member of congress*, and within the principle for which the privilege was introduced: and a different construction from that contended for in his behalf, would place him upon the footing of a mere sojourner—which is repugnant to the plain terms of the law.

I concur that Lewis be remanded to the gaoler.

BRACKENRIDGE, J. Concurred.

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PENNSYLVANIA.

Court of Common Pleas: Philadelphia County, March 30th, 1813.

In the Case of FIELD.

[Act of Congress, 12 Dec. 1812. An enlistment by a person under arrest for debt will not relieve him from the civil process.]

This was a Habeas Corpus to the keeper of the debtors apartment, to bring up the body of Benjamin Field.

By the return it appeared he was arrested in January, 1813, and detained in prison by virtue of several writs of capias ad respondendum, issued out of the District Court for the city and county of Philadelphia.

The application for his discharge was under the act of congress passed the 12th December, 1812, entitled "An act encreasing the pay of non-commissioned officers, musicians, privates and others of the army, and for other purposes," the second section of which provides "That during the continuance of the war with Great Britain, no non-comissioned officer, musician, private, driver, bombardier, mattross, sapper, miner, artificer, saddler, farrier or blacksmith, enlisted in the service of the United States, during his continuance in service shall be arrested *or subject to arrest* or be taken in execution for any debt contracted before or after enlistment.

S. Levy and J. M. Porter on behalf of the creditors, opposed his discharge, and contended that the act of Congress did not apply to the present case, as the arrest was made before the enlistment, that it only applied to cases where the party had enlisted prior to the enlistment; that the courts are bound to construe all statutes which interfered with the rights of third persons, or were in opposition to the common law strictly according to the letter, that to discharge the

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petitioner under the present circumstances would be opening a wide door for fraud on innocent creditors. For a debtor on being arrested on civil process, had only to enlist, apply to the court and be set at liberty, with money in his possession, which he refused to deliver to his creditors, (as they apprehended was the case in the present instance,) and when released compromise with the recruiting officer for his time and leave the state: thereby putting his creditors at defiance, being out of their power to arrest him. That members of Assembly were only priviledged from arrest during the time of legislation: But if a person being arrested, were afterwards elected a member, such election would not discharge him from the arrest previously made.

J. R. Ingersoll, for the petitioner, contended that he was entitled to his discharge under the second section of the act, for the words of the act of Congress are, that no private and others mentioned in the act during his continuance in service, shall be arrested or subject to arrest. The detention of a person in prison is considered in law as an arrest without relation, back to the time of the original commitment. The object of congress in passing this law, perhaps, was to fill up the ranks of the army from the prisons. The necessity of having soldiers, required such a provision. The hardships inflicted on creditors by such a provision, were not to be taken into consideration by the court, in executing a positive statute, and they will in a measure adopt the maxim *inter arma silent leges.*— The court were executing laws already made, not making laws. The statute says he shall not be subject to arrest, and it cannot be denied but that the petitioner *is now the subject of an arrest*, and has been subject to that arrest ever since his enlistment. As to the injury to creditors it would have been the same in effect if the petitioner had enlisted before the arrest was made, as it would if the court were now to discharge him on account of his having enlisted since. The effect of his privilege from arrest was a question for the consideration of the legislature and not of the

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court, who were bound to execute laws passed by the legislature without inquiring into their policy or effect.

Rush, President. The case is this—Field was arrested for a debt and carried to prison, where he enlisted. Is the enlistment valid against the creditors?

The meaning of the law must be collected from the words in which there is no ambiguity, on the present controversy.—The law says a soldier in our army shall not be arrested for debt *contracted* before or after his enlistment, which is a very different thing from saying he may enlist after he has been arrested. The propositions are by no means convertible—that a man shall not be arrested for debt *after* he has enlisted, and that he may enlist *after* being arrested for debt.

The question is, which was the first act, the *arrest* or the enlistment. If the enlistment was the first act, the arrest is contrary to law; but if the arrest was first, the enlistment afterwards is void.

In England the parliament are in the practice of passing positive laws to discharge *debtors confined* in prison, on the condition of their going into the navy or the army; and congress may, no doubt, exercise a similar power, and authorize debtors to enlist *after* they are arrested; but until this be done, in our opinion the enlistment is void.

Habeas Corpus.

SUPREME COURT OF PENNSYLVANIA.

In the matter of *Everard Bolton.*

September, 1815. *Pittsburgh.*

By the Court. By the return of this Habeas Corpus and the evidence produced to the court, it appears that E. Bolton, being a private in Capt. Clark's company, 19th regiment of Pennsylvania militia, was

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drafted in pursuance of general orders of the governor, of the 5th September, 1812. On the 31st March, 1814, he was found guilty of delinquency, in not marching according to orders, by a court martial held in pursuance of general orders of the governor, dated 29th October, 1813, and sentenced to pay a fine of 60 dollars, or undergo an imprisonment for twelve calender months. The sentence was approved by the governor, and Bolton was arrested by virtue of a warrant issued by the president of the court martial, directed to the martial of Pennsylvania or his deputy, no goods or chattels having been found on which the fine could be levied. Bolton asks to be discharged from imprisonment, because the court who convicted him, acting under the authority of the state of Pennsylvania, and not of the U. States, had no jurisdiction in his case.

By the constitution of the United States, Art. 1. Sect. 8. the congress have power "to provide for calling forth the militia, to execute the laws of the union, suppress insurrections, and repel invasions." By virtue of this power, congress may make laws to enforce their call—they may inflict penalties for disobedience and erect courts for trial of offenders—and they have exercised these powers. By the act of the 28th February, 1795, Sect. 1. the president of the United States is authorized, in case of invasion or imminent danger of invasion, to call forth such number of the militia as he may judge necessary, &c. and to issue his orders to such officer or officers of the militia as he may think proper. By the 4th Section of this act, the militia employed in the service of the United States, are subject to the same rules and articles of war as the troops of the United States. By the 5th section, every officer, non-commisioned officer and private of the militia, who shall fail to obey the orders of the president of the Unted States, in *any of the cases before recited*, shall forfeit and pay a sum not exceeding one year's pay, to be determined and assessed *by a court martial* and be liable to be imprisoned, by a like sentence, on failure of payment of the fine, one calender month for every $5 of such fine—and by the 6th section, courts

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martial for the trial of the militia, shall be composed of militia officers only. By the act of 10th April, 1812, the president is authorized to require of the executive of the several states to organize and arm 100,000 of the militia, and to call into actual service, any part or the whole of them, in all the exigencies provided by the constitution, and the officers, non-commissioned officers, musicians, and privates, are made subject to the penalties of the before mentioned act of 28th Feb. 1795. Whatever orders were given by the governor, respecting the militia called for by the president, must be considered as given in pursuance of the call of the president, and the breach of those orders was consequently a breach of the orders of the president, and falls within the provision of the act of 28th Feb. 1795. The question then is, how is that act to be understood when it speaks of the sentence of *a court martial?* The object of the act being to provide for the exercise of a power vested in congress by the constitution, it must be supposed, unless the contrary is expressed, that every thing directed to be done, was to be under the authority of the United States. When a court martial then is mentioned, in general terms, the most reasonable construction is, that it was to be a court under the authority of the president. The provision in the 6th section, that the court shall be composed of *militia officers only*, shows clearly that there was no idea of a court under *state authority*, for in such case the provision would be nugatory, as a state could pretend to no authority to constitute a court of any other than *militia* officers. There are other reasons for supposing that it was the intention of congress to keep the whole authority over the militia called into actual service, in their own hands. It is of great importance to prevent the collision of clashing jurisdictions on this vital subject. The act of 1795 authorizes the president to issue his orders immediately to any officer of militia, without passing through the medium of the governor, and I believe it to be a fact well known, that this precaution was introduced, in consequence of difficulties which had occurred in calling out the militia to suppress an insurrection in the western parts of Pennsylvania, in the

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year 1794. We have further evidence of the sense of the United States on this subject, by the act of 18th April, 1814, by the first section of which it is enacted, that " courts martial to be composed of militia officers alone, for the trial of militia, drafted, detached and called forth, for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held and conducted in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts martial for the trial of delinquents in the army of the United States." It appears then that whether we consider the words or the subject and spirit of the constitution and laws of the United States, a court martial for the trial of offenders charged with disobedience of the orders of the president, can derive authority from no other source than the U. States. But it has been contended that the governor by his own authority, as commander in chief of the militia, may order a court martial for the trial of persons who have disobeyed his orders. In answer to this, it is to be observed, that the governor issued his orders for calling out the militia expressly at the request of the president of the United States, so that it is in truth the order of the president, communicated through the governor. It is to be recollected too, that by the constitution of Pennsylvania, Art. 3. Sect. 7. the governor ceases to be commander in chief of the militia, when they are called into the actual service of the United States. This provision was necessary, because by the constitution of the United States, Art. 2. the president is " commander in chief of the army and navy of the United States, and the militia of the several states, when called into the actual service of the United States." Besides, I know of no law of Pennsylvania which authorizes the holding of a court martial for the trial of offenders against the United States, and it would be extremely hard if there was; for it is certain, that no punishment inflicted under a state law could prevent the United States from prosecuting for the same offence on their own authority, nor would an acquittal by a state court be any bar to a prosecu-

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tion before a court of the United States. But granting that the governor was not commander *in chief* of the state militia, and, therefore, could not hold a court martial by *his own* authority, it has been argued, that though not *commander in chief* he was still *commander* of the militia in the service of the United States, and as such might order a court martial under the laws of the United States; and in proof of this construction of the constitution, have been cited the cases of the governors of Pennsylvania and New Jersey, who cammanded their militia in person, in the insurrection of 1794, and of the governors of Ohio and Kentucky, who took the field and retained the command of their militia in the late war. What passed between the president of the United States and those governors, or by what authority they exercised their commands, or what rank they held in the army of the United States, I am not informed, nor is it necessary to make a question of it on the present occasion, because the governor of Pennsylvania did not take the field, but remained in the exercise of his authority at home, while the militia marched under the command of inferior officers. Now it will not be pretended, that the President of the U. States ordered the governor or had power to order him, into actual service. The sovereignty of the state protects him from such an order—he still remains commander in chief of all the militia not in the actual service of the United States, and he has civil duties of so imperious a nature, as may render his presence at the seat of government indispensable, for no law can be enacted without him.

On no ground, then, which has been taken, nor on any other ground which I can porceive, can the proceedings of this court martial be supported. The offence was against the U. States, and should have been prosecuted under their authority. But it was prosecuted under the authority of Pennsylvania. The sentence, therefore, was *void*, and we must direct the prisoner to be DISCHARGED.

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LEGISLATURE OF MARYLAND.

BY THE SENATE, 31st January, 1814.

Gentlemen of the House of Delegates,

WE have received your message returning the bill, entitled, An act to declare in force an act, entitled, "An act to punish certain crimes and misdemeanors, and to prevent the growth of toryism," passed the February session, 1777, with the reasons which are stated to have occasioned its being negatived in your house.

Whatever motive may have led to the expression of these reasons, we should have deemed them more strongly called for if any amendment or alternative had been proposed by your body, or if a reconsideration had been pressed by us.

But although we are disposed to abstain from the fruitless measure of urging such reconsideration, we think it proper to reply, briefly, to the objections which the message contains, and, in so doing, to explain and justify the grounds on which the act was originated in this branch of the legislature.

We are strongly impressed with the opinion, that there is such a trait of resemblance between the present and former war, and in the opposition to both, as to call for decided measures, similar to those that were in the revolutionary contest deemed to be necessary, and found to be effectual.

We are now as we were then, in a critical and arduous situation. We are now struggling not to gain but to preserve our independence, and we are now assailed by the same powerful enemy without, and threatened, as we then were, by traitorous combinations and conspiracies within.

Looking at the preamble to the act in question, we see that the clemency of the general government has not had the desired effect, of reclaiming such of its inhabitants as are inimical to its freedom, from their evil practices, but that, still pursuing their dark and criminal designs, they continue to encourage and pro-

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mote the operations of our enemies. And looking at the recent transactions, we may say that every hope of uniting to the interest of their country the affections of these, its unnatural and implacable enemies, is extinguished.

But although every hope of a union, arising from sentiments which ought to actuate them, may fail, it does not follow that the vigilance of government should cease; but a stronger motive arises for suppressing, by the provisions of law, these crimes and misdemeanors, and that growth of torryism, which might otherwise impede the operations of the just war in which we are engaged, and in future endanger our freedom and independence. The act of 1777, made punishable, the offence of levying war against the United States, or any of them; of adhering to any person bearing arms, or employed in the service of Great Britain, against the United States, or any of them, or affording them aid or comfort, or giving them inteligence of warlike preparations.

It provided for the offence of corruptly or seditiously persuading or enticing any of the inhabitants to return to, or acknowledge any dependence on Great Britain.

It provided for the offence of persuading, exciting by word, deed, writing, printing, or other act, the inhabitants to resist the government, or in any manner obstructing, by force, the execution of any of the laws.

It made punishable the offence of advisedly and maliciously dissuading and discouraging persons from enlisting or engaging in the army or the navy of the United States, an offence striking deeply at our safety, and which there is too much reason to believe, has been in this state committed with impunity.

The act provided also for the offence of seditiously endeavouring to support or justify the measures taken by the King and Parliament of Great Britain against the United States, or any of them. And it is needless to call to your recollection, the many and flagrant instances of the like offence, in regard to the measures which are now taken by that government.

We believe that many of our citizens during the

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last summer, while a British force was in the Chesapeak, supplied them with provisions, so as to enable them to continue within the limits of this state, burning our towns and desolating our country. We believe there have been instances of combinations of our citizens for the purpose of preventing resistance.

And, if reliance is to be placed in the official account of Admiral Cockburn, a deputation was sent from one of our towns, assuring him that no resistance would be made if his forces should make a descent on them.

Upon the same principle of clogging the operations of the war, on our part, endeavours have been made to dissuade our citizens from loaning money to the United States, and to prevent the banks from affording a similar aid.

Our predecessors in the revolutionary war ever were wise, faithful and vigilant—whilst bravely combating open force, they kept an eye upon insidious treason and machinations; surrounded by dangers nearly equal, it behoves us to exert our wisdom and precaution, and to emulate them in fidelity and watchfulness.

The act, which it was proposed to revive, raised the arm of the law against the guilty only. It held no terror to the innocent, and its provisions were to be in force so far only, as they were compatable with the law and constitution of the U. States, and of this state; and there might be exigencies in which, for the public safety, it would be proper to suspend the act, of *habeas corpus*.

Although in the title of the act of 1777, its object was in part to suppress the growth of toryism, which its framers might have considered as likely to produce the crimes of treason and sedition, toryism itself was not therein stated as a crime, and it is, therefore, deemed unnecessary to examine critically the meaning or derivation of the word. If not accurately defined during the revolution, it was then well and clearly understood; and to those who remember those days that tried men's souls, it will be sufficient for us to state our belief, that it is the same thing now that

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it was then—unless, indeed, that it now appears with bolder front, and calls more imperiously for the restraining power of the law—and if the voice of a large proportion of the people has been raised in strong terms against it, let the blame rest on those whose conduct has called for such indignant expression.

To the veterans of the revolutionary army, and to the patriots of that day, we are ready to express, as we feel, our respect and regard for their services.—But in looking to the past, we must not be blind to the present time; and it was in vain that the fabric of our independence was raised, if its authors now shrink from its support, or lend their efforts towards its destruction.

We have then stated our sentiments on *this bill*; and without sending it back, at this late *period*, we shall leave the people to judge of the correctness of its adoption by us, and its rejection by your body.

By Order,
T. ROGERS, *Clerk*.

By the House of Delegates, January, 31, 1814.

Gentlemen of the Senate,

On Saturday evening the house rejected a bill, which originated in your body to revive an old act of 1777, for the "punishment of certain crimes and misdemeanors, and to prevent the growth of toryism,"—The reasons of this house for rejecting the bill, were explicitly stated in a message which accompanied its return to the senate. This morning we informed your body, that we should be prepared to adjourn this evening; and early to night we received an answer from you, stating that you would be ready to close the session at 8 o'clock. More than two hours have now elapsed since the hour you thus fixed upon; and at this moment, when we were excepting, and have been impatiently waiting to be apprised of your immediate readiness to receive the governor for the purpose of signing and sealing the laws, we have received an elaborate message from you urging the motives and considerations which have actuated the senate

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in holding up to popular view the charge of toryism against those who do not implicitly believe in the wisdom and virtue of the present war, and the immaculate infallibility of the rulers by whom it was wickedly declared, and has been wretchedly conducted.—Silence, perhaps, would best express the only sentiment your message is calculated to excite; and we should certainly feel it an idle waste of time, to postpone the adjournment of the session for the mere purpose of repelling insinuations, which are equally stale and absurd, unfounded and disreputable.

It is not for us to say, what personal knowledge the senate may have of the principles of toryism, or those traitorous combinations and conspiracies which they have imputed to the present time—Our own associations have never led us into discoveries of that nature; and the only serious accusations we have seen published to the world, have been, not against the opponents of this pernicious war, but against persons who have been among the foremost in the clamorous ranks that have so often pledged, "*their lives, fortunes, and sacred honours,*" in support of that war. In conclusion, we cannot refrain from remarking, that there is one section in the old law, proposed by the senate to be revived, which might suggest a strong motive of generous forbearance to us against the passage of the bill. That section would authorize the governor and council, at their discretion, to cause the arrest of any persons liable to suspicion, it would be painful to us to perceive the authors of any penal statute, or their friends liable perhaps to become the first among its victims.

By order,
U. S. REID, *Clerk.*

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Habeas Corpus.

ANNAPOLIS, 26th January, 1814.

In the house of delegates Mr. John Hanson Thomas, moved for leave to bring in a bill entitled "an act declaratory of the law on returns to writs of *Habeas Corpus*, and for the better protection of the liberty of the citizen."

Mr. Thomas explained the reasons and subject of his motion by entering into a statement of a case, which had occurred under his immediate observation, where it had been judicially decided, that on the return by the officer to a writ of *Habeas Corpus*, the party complaining of illegal restraint could not be allowed to controvert the truth of such return, or plead any matter repugnant thereto. It was the case of a citizen of Frederic County, of the most respectable connections, who had been seized by a military recruiting party under pretence of enlistment, and who was prepared with his affidavits and his witnesses before the Judge to prove that at the time of the pretended enlistment he was in a state of intoxication in a country tavern, that in this situation an attempt had been made to impose the bounty money on him, which he immediately spurned at, that he did no act whatever by which he could be considered as having enlisted, but on the contrary had indignantly refused and threatened the party by whom the overture was made to him, and that in fact he was not in a condition at the time to make a valid contract or to enter into a binding engagement; but that yet he had notwithstanding been advertised as a deserter from the United States army, and was now under military arrest.

Mr. Thomas stated, that upon the offer to prove these facts, the Judge had suggested to the officer, whether he could not alter his return so as to alledge positively that the enlistment had been regularly and fairly made; that the officer, (who could know nothing of the circumstances but from his Sergeant,) immedi-

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ately altered his return, making the averment as suggested, and that it was then determined by the Judge, that he could receive no evidence to contradict the return or to show the circumstances under which the alledged enlistment had taken place.

Mr. Thomas said, that it was but fair to observe that this judicial construction had been given as it was understood in conformity with the terms of an English authority, to which he would refer the house. (*Bacon's Abridgment. Title Habeas corpus.*)—He did not mean now to trouble the house by examining the authority thus adduced, or its applicability to the question which arose in this case. The law had been fully and very ably argued by a gentleman of eminent distinction in his profession, with whom he had been associated as counsel for the prisoner. But it was ruled, that the return of the officer was conclusive, and the party complaining was accordingly remanded into custody. An attempt was afterwards made by his counsel to relieve him by resorting to the old English writ *De homine replegiando.* The court, to which it was returned, on motion to quash, had decided that this writ was not an available remedy in this state, and the matter was now depending in the Court of Appeals.

It will be perceived, said Mr. Thomas, if the law on returns to writs of *habeas corpus* really be as was here decided, the party aggrieved may in every instance be deprived of the opportunity of having the circumstances of his arrest investigated, and he can obtain no relief, and no sort of redress, but the very uncertain and inadequate damages to be recovered in an action for false imprisonment. If this be law our liberties are at the mercy or upon the word of every petty military tyrant in the country; and no man's person has any other security from despotic violence, but the strength of his own nerves and the vigor of his spirit. The great writ of *habeas corpus*, the pride of our ancestors, and the boasted bulwark of the freedom they transmitted to us, is reduced to an unsubstantial form, altogether ineffectual for the security of that freedom; or may become the treacherous instrument of its destruc-

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tion by occasioning a sort of constructive legal sanction to uncolorable acts of usurpation. In the present situation and prospects of the country he deemed it a matter of the first importance, and it was high time, that the legislature should declare that such is not and shall not be the law in this free state; and that a timely provision should be made against the evils and abuses, that must be expected to grow out of a doctrine, which subjected the common rights of freemen to the most precarious and arbitrary tenure. In a season of war and public difficulty like the present, the purposes of military convenience are not unfrequently incompatible with the principles of civil liberty; at such a moment the encroachments of power ought, therefore, to be most carefully guarded *against;* and the privileges of the citizen should be *vigilantly* and sacredly protected, as well against sinister artifice as against open force, by the faithful providence of the legislature, as constitutional guardians of the safety and happiness of the people, &c.

Having concluded his remarks, which were extended to considerable length, on the interesting topics which the subject naturally presented, leave was given to bring in the bill; and Messrs. Thomas, Bayly, and Maulsby, were appointed a committee for that purpose.

Mr. Thomas from the committee reported the following bill, which was read the first and second time by a special order, and passed. Having received the assent of the Senate on the last day of the session, it is now a law of the State, and is published for the information of the citizens.

An act declaratory of the law on returns to writs of Habeas Corpus, and for the better protection of the liberty of the citizen.

Be it enacted by the General Assembly of Maryland, That it is of right, and shall in all cases be competent for the party complaining of illegal detention or confinement, in whose behalf a writ of *habeas corpus* hath been issued by the proper court, Chancellor, Chief Justice, or other Judge, already authorized by law to issue the same, either during the sitting of the court

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or in vacation time, on return of said writ made by the officer or other person to whom it hath been directed, to controvert by himself or his counsel the truth of such return, or to plead any matter repugnant thereto, or to avoid the effect thereof; whereby it may appear from the circumstances to be proved, that there is not a sufficient legal cause for such detention or confinement.

And be it enacted, That it shall be the duty of the said court, chancellor, chief justice, or other judge, on application in behalf of the party complaining, or the officer or other person making the return, to issue *subpœna* or *subpœna duces tecum* and process of attachment if requisite, returnable at the day and place, and in the manner therein directed, to be served by the sheriff of the county or his deputy, and to be enforced as the like process may now be enforced in courts of law, in order to compel the attendance of witnesses, whose testimony it may appear on affidavit or other reasonable cause shown is necessary for the purpose of proving all the circumstances of the detention or confinement aforesaid, whereby such court, chancellor, chief justice or other judge may be enabled truly and justly to decide and determine whether there is any legal warrant or authority therefor, or whether the party restrained of his liberty shall not be forthwith released and discharged.

SUPREME COURT OF U. STATES.

Bank of Columbia,
v.
Patterson's Adm'or.

By the Court. Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say, that the practice of filing numerous bills

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of exceptions is very inconvenient, for all the points of law might be brought before the court in a single bill, with a simplicity which would relieve the bar and the bench from very unnecessary embarrassment. As the argument on the first exception has proceeded upon the ground, that the agreement of 1804, was completely executed and performed, and the objection relates only to a supposed mistake in the form of the declaration; it will at present be considered in this view, and we take it to be incontrovertably settled, that indebitatus assumpsit will lie, to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed, and that it is not in such case necessary to declare upon the special agreement—Gordon v. Martin, Fitz G. *303*; Mason v. Price, 4 East. 147; Cook v. Munstone 4 Bos. and Pull. 351; Clark v. Gray 6 East. 564. 569. 2 Saund. 350, note 2.—In the case before the court, we have no doubt that indebitatus assumpsit was a proper form of action to recover, as well for the work done under the contract of 1804, as for the extra work. It may, therefore, safely be admitted, (as is contended by the plaintiff in error,) that where there is a special agreement for building a house, and some alterations or additions are made, the special agreement shall notwithstanding be considered as subsisting so far as it can be traced. Pepper v. Burland, Peake's Rep. 103. The first exception, therefore, wholly fails.

Under the second exception the plaintiff in error has made various objections.

1. The first is, that though a promise would be implied by law for the extra work against the corporation, yet that such promise was extinguished by operation of law, by the provisions of the *sealed contract* of 1807.

It is undoubtedly true, that a security under seal extinguishes a simple contract debt; because it is of a higher nature, Cro. Car. 418 Raym. 449, 2 Jones, 158. 1 Burr. 9. 5 Com. Dig. Plead. 2 G. 12. but this effect never has been attributed to a *sealed* instrument which merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation.

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At most the sealed agreement of 1807, could not be construed to extend beyond this import. In no sense could it be considered as a higher security for the money originally due—this objection, therefore, cannot prevail, even supposing that the agreement were the deed of the corporation.

2. A second objection is, that the special agreements connected with the certificates of admeasurement were inadmissible evidence under the general counts, and could be admissible only under counts formed on the special agreements.

To this objection an answer has already in part been given, and we would further observe that if the agreements connected with the admeasurements, were the means of ascertaining the value of the work, the evidence was pertinent under every count. 2 Saund. 122. note 2. And if the certificates of admeasurement were of the nature of an *award*, they were clearly admissible under the insimul computassent count. Keen v. Butshore, 1 Esp. Rep. 194.

Another objection is, that as the agreement of 1807 is sealed and is connected by reference with the prior agreement, they are to be construed as one *sealed* instrument—and assumpsit will not lie upon an instrument under seal.

The foundation of this objection utterly fails, for the agreement is not under the *seal* of the corporation, but the *seals of the committee:* and, if it were otherwise, it is too plain for argument, that the original agreement was not extinguished, but referred to as a subsisting agreement. It is quite impossible to contend that the mere recital of a prior, in a later agreement, after it has been executed, extinguishes the former.

Two other objections are made under this exception, but as they are answered in the preceding observations, it is unnecessary to notice them farther.

Under the third exception, the only objections relied on are in principle the same as the objections urged under the former exceptions, and they admit the same answers.

The case has thus been considered all along as

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though the contracts were made between the plaintiff's administrator and the corporation, and indeed some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee *in their own names*; in consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A question has, therefore, occured, how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in the case, how far the facts proved show an express, or an implied contract on the part of the corporation. Anciently it seems to have been held that corporations could not do any thing without deed. 13 H. VIII. 12. 4 H. VII. 6. 7 H. VIII. 9. afterwards the rule seems to have been relaxed, and they were for conveniency's sake permitted to act in ordinary matters without deed, so as to retain a servant, cook or butler; Plowd. 91, 6. 2 Saund. 305. and gradually this relaxation widened to embrace other objects, Bro. Corp. 51. 3 Salk. 191. 3 Lev. 107. Moore, 612. At length it seems to have been established, that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts within the scope of his authority, would be binding on the corporation, Rex. v. Bigg, 3. P. W. 419. And courts of equity in this respect seeming to follow the law have decreed a specific performance of an agreement made by a major part of a corporation and entered in the corporation books, although not under the corporate seal—1 Fonb. 296. note (O)—the sole ground upon which such an agreement can be enforced, must be the capacity of the corporation to make an unsealed contract.

As it is conceded in the present case, that the committee were fully authorized to make agreements, there could be then no doubt that a contract made by them in the name of the *corporation* and not in their

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own names, would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff except against the committee.

The technical doctrine that a corporation could not contract, except under its seal, or in other words, could not make a *promise*, if it ever had been fully settled, must have been productive of great mischiefs; indeed as soon as the doctrine was established, that its regularly appointed agent, could contract in their name without seal, it was impossible to support it, for otherwise the party who trusted such contract, would be without remedy against the corporation: accordingly it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are *express* promises of the corporation: and all duties imposed on them by law and all benefits confered at their request, raise *implied* promises, for the enforcement of which an action may well lie: and it seems to the court, that adjudged cases fully support the position—Bank of England v. Moffat. 3 Bro. Chan. Rep. 362.; Rex v. Bank of England, Dougl. 524. and note ibidem; Gray v. Portland Bank, 3 Mass. Rep. 364—Worcester Turnpike Corporation v. Willard, 5 Mass. Rep. 80.; Gilmore v. Pope, 5 Mass. Rep. 491.; Andover and Medford turnpike Corporation v. Gould, 6 Mass. Rep. 40. In the case before the court, these principles assume a peculiar importance, the act incorporating the Bank of Columbia (act of Maryland 1793, c. 30.) contains no express provision authorizing the corporation to make contracts, and it follows that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes, not under seal. The corporation is made capable, to have, purchase, receive, enjoy, and retain lands, tenements, hereditaments, goods, chattels and effects of what kind, nature, or quality soever, and the same to sell, grant, demise, alien or dispose of, and the

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board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued, to appoint and pay the various officers and dispose of the money or credit of the Bank in the common course of Banking, for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question how far the Bank notes of this Bank were legally binding upon the corporation, and how far a depositor in the Bank could possess a legal remedy for his property, confided to the good faith of the corporation—In respect to insurance companies also, it would be a difficult question to decide whether the law would enable the party to recover back a premium, the consideration for which had totally failed: Public policy, therefore, as well as law, in the judgment of the court fully justify the doctrine which we have endeavoured to establish; indeed the opposite doctrine, if it were yielded to, is so purely technical, that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation; the contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter, the corporation proceed on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although then an action might have laid against the committee personally upon their express contract, yet as the whole benefit resulted to the corporation, it seems to the court, that from this evidence the jury might legally infer, that the corporation had adopted the contracts of the committee and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement: as to the extra work, respecting which there was no specific agreement, the evidence was yet

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more strong to bind the corporation. In every way of considering the case, it appears to the court that there was no error in the court below, and that the judgment ought to be affirmed.

VERMONT LEGISLATURE.

IN COUNCIL.

REPORT OF COMMITTEE.

To His Excellency the Governor and the Honourable Council, now in session.

Your Committee, to whom was referred the following questions, proposed by His Excellency——"*Can the milttia when in the actual service of the United States, be lawfully commanded by any officers but such as are appointed by this state except by the President of the United States?*"

REPORT,

That the Constitution of the United States, article 1. section 8. declares, "That Congress shall have power to provide for calling forth the militia to execute the laws of the union, suppress insurrection and repel invasion. To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia, according to the discipline prescribed by congress." In article 12. section 2. "The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the U. States."

It is the opinion of your committee that the different clauses quoted from the federal constitution, should receive a construction so as to render one clause consistent with another—The president may, undoubted-

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ly, command the army and navy of the U. States, by officers lawfully commissioned by himself; but he cannot so command the militia of the state when called into the actual service of the United States; for the appointment of their officers is a right reserved "to the states respectively." If, therefore, the president would command the militia, when in the actual service of the United States, he must do it in person or exercise his command over them by officers appointed by the states. The Congress have power to provide for organizing and disciplining the militia, and governing such part of them, as may be employed in the service of the United States; but to construe this act as a *constitutional right* of placing the militia under the command of any officer not of the militia, except the president, would render nugatory the following reservation, that is, "reserving to the states respectively the appointment of the officers, and authority of training the militia, &c. Your committee consider this an important reservation in the Federal Constitution, favouring the sovereignty of the state, and tending to secure the rights of the people. It is not, therefore, to be surrendered to the general government. As well might the officers of the militia, appointed by this state, claim the right to command the army of the United States, as the officers of the army of the United States, to command the militia.—There is no constitutional provision for either to claim such right or to exercise such command.

WM. CHAMBERLAIN,
For Committee.

Montpelier, Oct. 28, 1814.

The following is the Resolution adopted by the Hon. Council in compliance with the preceding report:

"*Resolved*, That it is the opinion of the council, that it is not *made* the duty of his Excellency, by the Constitution of the United States to put the detached militia of this state, when in the actual service of the United States, under the command of any officer commissioned by the president; but such militia are to be commanded by officers appointed by the state, or by the president in person." Adopted unanimonsly.

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Habeas Corpus.

SOUTH CAROLINA.

In the matter of Ephraim Merritt.

[What Constitutes an enlistment in the Army of the United States.]

NOTT, J. This case comes before me on a *Habeas Corpus* obtained by Ephraim Merrit, and accepted by the defendants, E. D. Dick and J. L. Rossau, (the first a lieutenant in the service of the United States, and the other a recruiting Sergeant under him,) and now brought on by consent. The object of the petitioner is to be released from the custody of the defendants, who pretend to detain him as an enlisted soldier.

There is no such contradiction in the testimony as to create any difficulty in ascertaining the facts in the case; and no such difference of opinion betwixt the council as to require any great research to determine the law upon the subject.—It is agreed that an enlistment is a contract and that this case must be governed by the rules of law applicable to other cases of contract. The question then is, whether the defendants have furnished such evidence of a contract as will authorize them to detain the petitioner as an enlisted soldier. To constitute a contract, it is necessary that there should be at least two parties; that they should be able, willing, and actually assent to the contract; and that it should be for a good consideration. The term assent, Mr. Powell says, signifies the acquiescence of the mind to something proposed or affirmed; and involves in consideration of law, first, a physical power of assenting; secondly, a moral power, and thirdly, a *deliberate* and free use of those powers—Powell on Con. 10. In another page he says, an essential ingredient of every contract is, that it be entered into freely of the parties own accord. Do. 370.

Now what is the evidence in this case. The petitioner swears, that a proposition being made to him to enlist, he absolutely refused, and never did consent;

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that the money which it is pretended he received as bounty, he took only to look at it, and that in looking at it, it fell on the floor.—That sergeant Rossau then insisted upon it as he had taken the money he had enlisted. But he uniformly persisted, both before and after that he would not, and had not enlisted. This affidavit is so strong that the council for defendant, seems to admit that if it is true, no such contract was made as is obligatory on Merrit. But it is said that the testimony of a man swearing to obtain his liberty, ought not to prevail against the oath of one who has so little interest as the officers has in this case. My mind is not prepared to admit the correctness of this opinion—I am not prepared to say that a man by wantonly seizing upon another and depriving him of his liberty, creates such an interest in him that he is not to be believed, or that by such an outrage the aggressor has so changed their relative situations that a preponderance is to be given to his oath. Neither am I satisfied that a mere verbal consent to enlist, even though accompanied with the receipt of money, would authorize an officer to detain a man who should instantly change his mind and declare, (*uno flatu* as it were,) that he would not enlist, and return the money again. I should doubt very much whether it ought to be considered that "*deliberate* and free exercise of the mind" which is necessary to constitute a contract; and one thing I am sure of, such a construction would open a door to monstrous abuse and oppression, and would render the recruiting service extremely unpopular and odious, which ought to be most scrupulously guarded against. Hence there is no necessity to give an opinion on these points, for the affidavit of Merrit, is certainly to be taken as true to all points where it is not contradicted, and in all its essential parts it is not only not contradicted, but is corroborated by the evidence of J. H. Fisher. He swears that Merrit refused to enlist from the beginning: that Rossau showed him the money, said it was United States money, and told him if he took it and looked at it, or words to that effect, he would be enlisted, and must go to the barracks; that Merrit said he would look at it, but

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would not take it as bounty. He, Fisher, then stepped out, and was absent about three minutes, and when he returned Rossau and Merrit was enlisted, but Merrit denied it. The money was then lying on the floor; one of the sergeants picked it up, and a file of men took Merrit off. Surely there is not yet any evidence of a contract.

Now let us examine the evidence on the other side. Rossau swears that he told Merrit if he took the money he should consider him as having taken the bounty and enlisted; that Merrit did take it; from whence he inferred he had taken it as a bounty, and was fairly enlisted. He admits that he threw the money down, and that one of the party picked it up, and that he now has it. He does not deny what is positively sworn on the other side both by Fisher and Merrit, that at the time Merrit took the money, he said he would look at it, but would not take it as bounty, nor does he pretend that Merrit gave any express consent to enlist, but from his taking the money he inferred, that it was his intention, although he expressly declared the contrary. And the declaration of Merrit made at the time, being a part of the *res gesta*, affords the highest evidence of the view with which he took it. Gibbon and Neusome swear that they were called by Rossau, to come and see him enlist Merrit, that when they came down they saw Merrit looking at a piece of gold in the hands of Rossau, that the said Merrit turned over the piece of money three or four times, and *evinced the appearance of a person wishing to enlist;* that Rossau told him that taking that piece of money from his hands would be considered as taking the bounty and giving his assent to enlist. From these circumstances, they infer that the money was taken as bounty, although Merrit held it only about a minute. They do not pretend that Merrit gave any express assent: nor do they deny what is sworn on the other side, that he did expressly dissent.

Here the evidence closes on both sides, and this is all the evidence on which Sergeant Rossau bottoms his claim to seize upon the person of a citizen, and drag him off to the barracks as an enlisted soldier.

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The whole amounts to this: he told Merrit if he took the money he would be taking the bounty, and he would be enlisted. He did take the money, and, therefore, he took the bounty and was enlisted. But the question is, did his saying so make it so. Is the fiat of Sergeant Rossau to be the law by which the recruiting service is to be regulated. Has the gold of the U. States a charm by which the mere handling of it converts a citizen into a soldier, or is a doubloon a magic wand in the hand of a recruiting officer, by the touch of which he changes a thing into whatever he pleases? Suppose Merrit had actually enlisted, and Sergeat Rossau had offered him a dollar instead of a doubloon, and told him that if he took it he *should* consider him as having taken it at the price of fifteen dollars; I presume it would not be contended that having accepted it would have made it of that value, or that the Sergeant would be permitted to settle his accounts according to that mode of calculation;—and yet I think it would be as correct logic as that by which he pretends to hold this man as a soldier. There is one other circumstance which perhaps ought to be noticed; Gibbon and Neusome swear they saw no trick or unfairness. But it is to be observed that they were not present until Merrit had taken hold of the money, and according to their own account, had but one minute to ascertain whether there was an unfairness or not; and yet during that short period these sagacious physiognomists observed that he "evinced the appearanee of a man wishing to enlist," although he had uniformly declared the contrary. But is it impossible not to see that it was all a trick? His eyes must be very dim who cannot see through the flimsy veil with which the transaction is attempted to be disguised. However, it is perfectly immaterial whether there was any unfairness or not, it is sufficient that there was no assent on the part of Merrit.

This individual may not have character enough to have enlisted the sympathy of the community on his side, and, therefore, his case may not have excited much interest. But let such conduct be tolerated towards him, and every citizen may read his own

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doom in the case of Merrit. But this case is perhaps still more important in another point of view. The success of the recruiting service depends almost entirely on the manner in which it is conducted. And it becomes every person concerned in the performance of such a difficult and delicate duty, to render it as popular as possible by the suavity of his manners, and the correctness of his deportment. If this practice is to be permitted, the recruiting officers will bring an indelible odium on themselves, dishonour on the government, and ruin on the service in which they are engaged. The sound of the drum, instead of being considered as an invitation to patriotic young men to rally around the standard of their country, or an inducement to come within the influence of the address which it is justifiable to use to procure recruits, will be viewed as a watchword to fly from the lure thrown out to ensnare them. But besides, men who are made the reluctant dupes of such artifice, are not of such character as the government want. They may be "fine food for powder," but they are not the men to be relied on in the hour of danger. In the cases which have heretofore been before me, I have said but little respecting the policy of this indiscreet conduct in the recruiting officers, lest even that might damp the progress of a service which so much required encouragement.—But the cases are multiplying so fast, it would seem that the greatest danger is to be feared from the quarter from whence the greatest encouragement ought to be expected. It is quite time to put a stop to this unwarrantable practice. I will conclude by observing, that if this case had not been brought before me in the hasty manner it has been, without an opportunity of reflecting on it, or of being informed of any of the circumstances, I should not have heard it, until application had been made to the officer who superintends the recruiting service at this place; for I am persuaded he would have rendered his application unnecessary; and frequent applications to the civil authority are calculated to cast an imputation on these officers, which they do not deserve—but as the case now stands, *I shall order the petitioner to be discharged.*

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...nsylvania,
April, 1814.

GOLDEN v. PRINCE.

WASHINGTON, J.—This is an action brought upon a bill of exchange drawn by the defendant on the 10th May, 1811, at the Island of *St. Bartholomews* for value received there, in favour of the plaintiff on himself at *Philadelphia* 90 days after sight, which was regularly noted for nonacceptance, and protested for nonpayment. This action was brought on the 4th May, 1812, to which the defendant pleaded in bar, his discharge under a law of this state passed on the 13th March, 1812, for the relief of insolvent debtors, obtained provisionally on the 23rd, April, and finally on the 20th May, 1812. The case agreed states, that the defendant did not give to the plaintiff, or to any agent of his, notice of the defendant's petition, which was presented on the 20th April, 1812, although the plaintiff's attorney was informed of the application, a few days after it was made; nor has the plaintiff proved his debt, under the said proceedings.

The act referred to in the plea declares that a debtor who has conformed to the several regulations of the law, for the purpose of vesting all his property in the assignees for the benefit of his creditors, and who has received his certificate of discharge from the commissioners, shall be set at large by the sheriff, if he be imprisoned; and that such certificate shall be conclusive evidence of the fact, that such petitioner has been discharged by virtue of that act, and shall be construed to discharge such insolvent, from all debts and demands due from him, or for which he was liable, at the date of such certificate, or contracted or originating before that time, though payable afterwards.

It is objected to this plea, 1st, That the act under which the discharge is claimed, having been passed

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since the year 1789, affords no binding rule of decision for this court: 2dly, that the law is unconstitutional and void, in two respects: 1st as being a bankrupt law, and 2dly, as being a law impairing the obligation of contracts.

The ground of the first objection is, that the 34th section of the judicial act of congress, passed on the 24th September, 1789, which declares, that the laws of the several states, except where the constitution, treaties or statutes of the U. States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the U. States, in cases where they apply, extends only to such laws of the several states, as were in force at the time when this law was passed. Admitting this position to be correct, it would not follow, that this law would not on that account have a binding force, or furnish a rule of decision in this case. The laws even of foreign countries where a contract is made, are, by the comity of nations, regarded every where as a rule of decision, in relation to that contract, and it would be strange if the laws of one state in which a contract was made, should be disregarded in any other state of the Union as a rule of decision. In like manner the laws of a country, which operate to discharge a contract made in the same country, are regarded and enforced by foreign courts. This doctrine was very fully examined in this court, in the case of *Comfranque* v. *Brunelle*, upon a question of bail.—Independent, therefore, of the act of congress, if a contract made in this state, or with a view to its laws, be discharged under a law of this state, against which, no constitutional objection can be made, such laws would be regarded as rules of decision by this court as well, that which discharged the obligation, as that under which it was created. It was denied by the counsel for the plaintiff, that the contract in this case, had a view to its execution, according to the laws of Pennsylvania; but nothing can be more clear, than that the bill in question amounted to a promise made by the defendant, to pay the sum mentioned in it, in the City of Philadelphia, ninety days after sight. Payment could have

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been demanded no where but in Philadelphia, in order to enable the plaintiff to recover. The bill in this case, is precisely like that in the case of *Robinson & Bland*, 2 *Burr.* and is consequently within the principles laid down in that case.

These principles would be sufficient for the decision of this part of the case, without resorting to the act of Congress which has been mentioned; but as other cases may occur where the general rule admitted by the comity of nations, may not entirely apply, and as there appears to me, to be no difficulty in giving a construction to the 34th section of this act; it may not be improper, to take this opportunity of doing it. It is to be remarked, in the first place, that the words of this section are general, so as to include as *well the* laws of the respective states, which might *thereafter* be passed, as those which were then in existence—The reason for construing this section prospectively, as well as in reference to the time when this law was enacted is equally strong. The powers bestowed by the constitution, upon the government of the U. States, were limited in their extent, and were not intended, nor can they be construed to interfere with other powers before vested in the state governments, which were of course reserved to these governments impliedly, as well as by an express provision of the constitution. The state governments, therefore, retained the right to make such laws as they might think proper, within the ordinary functions of legislation, if not inconsistent with the powers vested exclusively in the government of the U. States, and not forbidden by some article of the constitution of the U. States, or of the state, and such laws were obligatory upon all the citizens of that state, as well as others who might claim rights, or redress for injuries, under those laws, or in the courts of that state. The establishment of federal courts, and the jurisdiction granted to them in certain specified cases, could not consistently with the spirit and provisions of the constitution, impair any of the obligations thus imposed by the laws of the state, by setting up in those courts, a rule of decision at variance, with that which was binding upon the citizens.

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and which they were bound to obey. Thus the laws of a state affecting contracts, regulating the disposition and transmission of property, real or personal, and a variety of others, which in themselves are free from all constitutional objections, are equally valid and obligatory within the state since the adoption of the constitution of the U. States, as they were before. They provide rules of civil conduct for every individual, who is subject to their power, in all their relations to society, and, consequently, cannot in cases where they apply, cease to be rules, by which the conduct of those individuals is to be decided, when brought under judicial examination, whether the decision is to be made in a federal or state court.

The injustice as well as the absurdity of the former deciding by one rule, and the latter by another, would be too monstrous to find a place in any system of government. Thus for example, if the laws of a state which regulated the distribution or transmission of property in the year 1789, should afterwards be totally varied by a subsequent law, the latter only would be the rule by which property could be distributed or transmitted from the time the law came into operation; and it can never be seriously contended that a person interested in this property, and from the adventitious circumstance of his residence in another state, entitled to make his claim either in the federal or state court, should recover more by resorting to the former than he would have recovered had he applied to the latter court. With respect to rules of practice for transacting the business of the courts, a different principle prevails. These rules form the law of the court, and is in relation to the federal courts, a law arising under the constitution of the United States, and consequently not subject to state regulations. It is in reference to this principle, that the 17th section of the same judicial act authorizes the courts of the United States to make all necessary rules for the orderly conducting business in the said courts, provided the same are not repugnant to the laws of the United States; and under this power, the different circuit courts at their first sessions, adopted the state practice as it then ex-

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isted, which continues to this day, I believe, in all the states, except so far as the courts have thought proper from time to time to alter and amend it.

Indeed the counsel for the plaintiff in this case seemed to admit the distinction between general laws affecting rights and those which relate to the practice of the courts; still he contended that the act of assembly in question afforded no rule of decision for this court, and could not be pleaded in bar of the action because it was enacted since the year 1789. Now it is most clear, that a law which discharges a contract, is no more a law of practice than one under the sanction of which the contract was made. If it would bar the action in a state court, it would equally do so in a federal court; although the particular mode of setting up the bar might depend upon the practice and rules imposed by the state law upon the former courts, and those which the latter may have thought proper to adopt.

The next question is, whether the law relied upon by the defendant to bar the present action, is repugnant to the constitution of the U. States, and on that account is not to be regarded by the court in this case. I shall reverse the order pursued by the counsel, and consider, in the first place, whether this law is repugnant to the constitution upon the ground of its impairing the obligation of contracts.

It may be proper to premise, that a law may be unconstitutional, and of course void in relation to particular cases, and yet valid to all intents and purposes in its application to other cases within the scope of its provisions, but varying from the former in particular circumstances. Thus a law prospective in its operations, under which a contract afterwards made may be avoided in a way different from that provided by the parties, would be clearly constitutional; because the stipulations of the parties which are inconsistent with such a law, never had a legal existence, and of course could not be impaired by the law. But if the law act retrospectively as to other contracts, so as to impair their obligation, the law is invalid, or in milder terms, affords no rule of decision in these latter cases.

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The question then is: Whether a law of a state which declares that a debtor by delivering up his estate for the benefit of his creditors, thall be for ever discharged from the payment of his debts due or contracted before the passage of the law, whether the creditor do any act or not in aid of the law, can be set up to bar the right of such creditor to recover his debt, either in a federal or state court. I feel no difficulty in saying that it cannot, because the law is in its nature and operation one which in the case supposed, impairs the obligation of a contract. What is the obligation of a contract? It is to do, or not to do a certain thing; and this may be either absolutely or under some condition, immediately, or at some future time or times, and at some specified place. A law, therefore, which authorizes the discharge of a contract by a smaller sum, or at a different time, or in a different manner than the parties have stipulated, impairs its obligation, by substituting for the contract of the parties one which they never entered into, and to the performance of which they of course had never consented. The old contract is completely annulled, and a legislative contract imposed upon the parties in lieu of it. That a law which declares an existing contract to be void, impairs its obligation, will I presume, be admitted by all men who can understand the force of the plainest terms; or if not so, then I should be curious to know in what manner the obligation of a contract can be impaired? And if this be the effect of such a law, in what respect does it differ from another which declares that a debt consisting of a specified sum, and due at an appointed period of time, shall be discharged at a more distant, or indeed a different time, or with a smaller sum? The degree of injury to the creditor may not be so great in the one case as in the other, but the principle is precisely the same. That the framers of the constitution were extremely jealous of the exercise of such a power by the state governments, is apparent from other parts of the section in which the provision I am examining is found. It would have been a vain thing to prohibit the state governments from passing laws by which a contract might be annulled or discharged by the payment of

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a less sum than it stipulated, if they could emit bills of credit, and make them, or any thing but gold and silver coin, a tender in payment of debts; and, therefore, they are expressly prohibited from passing any laws which might produce such a consequence. And yet a law which should make a depreciated paper currency a tender in payment of debts, might be infinitely less injurious to the creditor than one which discharges the debt altogether, upon the payment of perhaps a shilling in the pound, or any other sum less than that stipulated to be paid.

The opinion given upon this last point, decides the cause in favour of the plaintiff, and I might well spare myself the trouble of examining the other objection made by the plaintiff's counsel to the validity of this law. But when I observe, from the case under consideration, that such a power is deemed by one state at least to be rightfully vested in the state legislatures, for otherwise I must suppose it would not have been exercised, and when I recollect that the constitution of the U. States contains a grant of other powers to the general government, which may equally with that immediately under consideration, be exercised by the state legislatures, if such a right exists in either case. I hold it to be my duty to embrace the first opportunity which presents itself, to express the unhesitating opinion which I entertain upon these great questions and thus to pave the way for as early a decision of them as possible, by the Supreme National Court.

No citizen feels a higher respect than I do for the state governments, or would be more cautious in questioning the validity of any laws which their legislatures might think proper to enact. But I should very unfaithfully discharge my duty were I to remain a silent witness of designed or unintentional usurpations by those governments, of powers properly belonging to the general government, when a case comes judicially before me, which demands an expression of my opinion upon those subjects. The sooner the limits which separate the two governments are marked by those authorities which can alone define and establish them, the less danger there will be of serious if not

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fatal contests hereafter arising respecting essential powers to which a prescriptive right may be asserted by the one in opposition to the chartered rights of the other. It is from these considerations that I venture respectfully, yet firmly, to examine the question, whether the power given to congress to pass uniform laws of bankruptcy, be exclusive of such power in the state governments, and whether the latter may exercise it whenever the former has not thought proper to do so.

It would seem at the first view of the question, that if any unqualified power be granted to a government to do a particular act, the whole of that power is disposed of, and not a part of it; consequently that no power over the same subject remain with those who made the grant, either to exercise it themselves, or to part with it to any other government.

But if the application of this principle to the complicated systems of government which prevail in the United States, should be liable to doubt, it will, I presume, be admitted with this qualification, that whenever such a power is given to the general government, the exercise of which by the state government would be inconsistent with the express grant, the whole of the power is granted, and consequently vests exclusively in the general government. In such a case the people resume the powers which before resided in the state governments, as to this subject, without which they could not grant the whole to the general government; and if resumed it would seem to follow that the state governments can, in no event, exercise the same powers without showing either an express grant of it, or that it is fairly to be deduced from the circumstance upon which the claim is founded.

That the exercise of the power to pass bankrupt and naturalization laws by the state governments is incompatible with the grant of a power to congress to pass uniform laws on the same subjects, is obvious from the consideration that the former would be dissimilar and frequently contradictory, whereas the systems are directed to be uniform, which can only be rendered so by the exclusive power in one body to form them.

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It was admitted in the argument of this cause, that whenever Congress shall think proper to exercise the power delegated to that body, to pass uniform laws of bankruptcy, the state governments cannot legislate upon the same subject. But it was contended, that if congress shall decline to exercise the power, the right to pass bankrupt laws results to the state governments. This conclusion appears to me to beg the whole question in controversy. It resigns all claim to a concurrent right to the state governments, and sets up one which is to arise on a condition, not to be found in the constitution, but which is gratuitously interpolated into it.

If then this claim of the state legislature is not founded upon any express grant made to them in the constitution, is it to be deduced from the circumstance of a non user of the power by Congress? This doctrine appears to me to be as extravagant as it is novel. It has no analogy that I know of, in legal or political science. It must in some way or other be likened to the case of forfeiture, which could not as I conceive, answer the purpose, because if the power of congress is, upon principles purely legal, devested by an omission to exercise a valid right, it would not of necessity result to the state governments, but would more naturally fall to the people. If the forfeiture be political, then this absurdity would follow, that congress would possess a right to do by *omission*, what it must be admitted they could not effect by any direct and positive act. That is, to delegate to the state governments, the power of legislation over a particular subject, of which the people had thought proper not only to deprive the state governments, but to vest exclusively in the national legislature.—The inconvenience of dissimilar and discordant rules upon the subjects of bankruptcy and of naturalization, no doubt suggested to the framers of the constitution, the remedy which that body adopted, of vesting the right to legislate in those cases in the general government, that some, uniform system might prevail throughout the United States if congress should think that any regulations upon these subjects ought at all to be made. Now it would not

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only violate the express grant of these powers to congress, but the policy which led the convention to withdraw them from the state governments, if they should be construed to result by implication to the latter, on account of the omission of the former to exercise them. But let us examine into the reasonableness of this pretension of the state legislatures, and see if the policy which induced the grant of these powers to congress, be not effectually answered by the omission of congress to legislate on those subjects, as much so as if they had. Suppose, then, the subject of a bankrupt law to be brought before congress, and the questions to be whether such a system be a wise one under any circumstances, or be at all suitable to the present state of the country, and that body should, in its wisdom, decide negatively on those questions; it would seem to follow that no bankrupt law ought to exist in the U. States for the reasons which induced the rejection of any plan to establish such a system. In this case what is congress to do in order to give effect to this measure of policy? The answer is plain, reject the bill and do nothing. Then the law of the land would be that no man is compelled against his will to deliver up his property to be distributed among his creditors, and consequently that he is at all times liable to the payment of his debts unless discharged by some other legal means. Now will it be said that the state legislatures availing themselves of the silence of congress on this subject, can be at liberty to thwart the very policy which induced it, and pass laws upon the subject not only changing the state of the law as congress had constitutionally left it, but impugning the policy which led the convention to deprive the state legislatures of the power altogether, by imposing upon the country at large a variety of systems, instead of one uniform system? To argue, that to prevent such an absurd consequence, congress must legislate upon the subject, is to assert that in the exercise of a power intended to promote the general good, congress must do some act which in its wisdom it believes will produce a public evil—Do wrong that good may come of it—a doctrine as pernicious in politics as it is wicked

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in morals. How would state laws upon this subject, and in the case supposed, differ otherwise than in degree, from similar laws passed, inconsistent with such as congress might think proper to enact upon the same subject. In the one case the policy and the law of congress might be opposed in part only by the state law. But in the other, the whole policy and law is defeated by inconsistent rules upon a subject, where congress supposed that it was unwise to establish even a uniform rule.

The subject of naturalization is strongly illustrative of the principles which this course of reasoning is intended to prove. The power to pass laws upon this subject is found in the same section, and is expressed in *words of* the same import with that respecting bankruptcies. Now suppose congress deliberating whether the naturalization of foreigners ought, upon any or upon what terms to be allowed.—That the consultation of that body should end in the conviction, that the natural population is most conducive to the public interest, and, therefore, that no encouragement ought to be given to the migration of foreigners to the United States. In what manner is this policy to be rendered effectual? Congress cannot for the purpose of preventing the state legislature from interfering in this business, pass a negative law, declaring that foreigners shall not be naturalized, because if the constitution forbids the exercise of such a power by the state legislatures, such a law would be worse than unnecessary, and if it does not forbid it, then it would be void. Nothing then remains for the body, but as in the former case, to do nothing.

This then, according to the argument on the part of the defendant is to be the signal for the state legislatures to commence their operations. Virginia for example, is of opinion that for the purpose of settling her extensive waste and uncultivated lands the migration of foreigners to that state ought, by every means, to be encouraged, and in order to favour this policy, she declares that the residence of a year or a month, without any other restriction whatever, shall be sufficient to entitle all foreigners to the right of naturaliza-

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tion in that state. They are accordingly made citizens, and after the constitutional period, are chosen to represent that state in the national legislature, and emigrating to the other states, they claim all the privileges of natural born citizens, of those states.

The other states might well complain, that although the people had declared their willingness to admit foreigners to the privileges of natural born citizens, provided the regulation under which this admission is granted, were formed by the united wisdom of the representatives of all the states, but that they had never granted to one state the right of legislation over the other states. They might contend that the introduction of foreigners to the electoral franchise, and still more into the national legislature, was an experiment dangerous to the tranquillity and the welfare of the nation; that they might be tainted with principles unfriendly to our republican institution, and with foreign attachments, wholly incompatible with their duties as citizens and legislators; that if admitted at all, they should not only abjure all allegiance to any other government, and if of the order of nobility, renounce all claim to the same, but that they ought to be men of good moral character, and attached to the constitution of the United States; and finally, that the grant of this privilege should be preceded by a probationary residence in the United States for a length of time sufficient to afford the necessary proof of the reality of these qualifications in the applicant.

To these complaints what could reason oppose? Nothing.—She must be silent. And is this then a case where powers not expressly given by the constitution, are to be assumed by construction and implication? It certainly will not be contended, that the powers to pass bankrupt and naturalization laws, are by the amendments to the constitution, reserved to the states, in cases where they are exercised by congress, because this reservation is made only of such powers as are not granted to the general government—If granted, it would seem to follow that they are not reserved to the states or to the people.

But it is not in my opinion correct to say, that con-

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gress by refusing to pass laws on these subjects, has not exercised the powers confided in that body by the constitution in relation thereto. The refusal amounts to a declaration of the public will, that such laws are unwise, and ought not to exist. And yet upon the argument in favour of state pretentions, this monstrous doctrine must be maintained, that one or more states may pass laws, not only in opposition to the policy and the legislative will of the general government, but to the laws of the other states, enacted upon the same subjects, which to a certain extent, they partially repeal, a doctrine leading to such absurd and dangerous consequences, ought to have something more solid to stand upon, than a constructive *grant of* power.

I am, upon the whole, of opinion, that the law under which the certificate is pleaded in bar of the action, is altogether unconstitutional for the reason last assigned, and is so in reference to this debt for the first reason.

I desire, that it may be distinctly understood, that I do not mean to give any opinion on the subject of insolvent laws, acts of limitation, and the like; because they are not now before me; and sufficient to the day, will be the evil thereof. I have introduced the subject of laws of naturalization, because I find that subject to be in all respects, precisely like that which is particularly involved in this cause.

CIRCUIT COURT: UNITED STATES. DELWARE, 1815.

Alexander Murray v. *Allen M'Lane.*

* DUVALL, J. The declaration in this case is drawn with great care, and exhibits a full state of the plaintiff's case. It contains two counts. The first count charges the defendant with having falsely, malicious-

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ly and without cause, instituted a suit against the plaintiff, comanding heavy bail whereby he was arrested and imprisoned. The second count charges that the suit was instituted maliciously and without cause, and that excessive bail to the amount of $1,200,000 was demanded, *in a case where he had no right to demand bail*, in consequence of which he was arrested and imprisoned.

This action, in its nature, is peculiar and delicate. Formerly, it was used as a remedy for malicious prosecutions only. It was afterwards, adopted as a remedy where a civil suit had been maliciously and without cause instituted against the party.

The court has been applied to by the counsel for the defendant to instruct the jury upon the law arising in the case.

The jury must have observed that the counsel engaged in this cause, have not materially differed as to the proof which the plaintiff must necessarily produce in order to sustain his case:—*That the original suit was instituted maliciously, and without reasonable or probable cause.*

The Court consider the law upon this subject as settled. This species of action is not favoured in law. It is incumbent on the plaintiff to prove that the suit by the defendant was instituted with malice, express or implied, and without probable cause. Without probable cause, malice may be implied according to the circumstances of the case; but from the most express malice, want of probable cause cannot be implied. Hence, to sustain this suit, the plaintiff must prove malice express or implied, and that there was a want of probable cause.

Whether malice existed or not, is a matter of fact for the jury to decide, taking into consideration all the circumstances of the case.

The question of probable cause, is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause is a question of law to be decided by the court.

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Whether the bail required in this case was excessive or not, depended in a great measure upon the law of the State of Delaware, and the practice of the courts under those laws. In Maryland, in an action of this kind, no man could be held to bail for the trifling sum of fifty dollars without an affidavit. In Delaware, I understand the practice as proved to be different, and that a man may be required without affidavit, to give bail to any amount according to the value of the thing in contest, in the first instance. He may afterwards be exonerated on application to a judge or justice for a rule on the plaintiff to show cause why he may not be discharged on common bail: and it also appears that the practice is to require bail *in double* the amount of the value of the ship in dispute. *In the* case under consideration, it does not appear to the court that $1,200,000 was more than double the value of the Superior and her cargo.

The question of probable cause has been considered as involving the legality or illegality of the seizure and the possession of the Superior by the plaintiff—and by the defendant. Here it is necessary to recapitulate the evidence in the case. The principal facts appear to be these: On the 24th of August, 1812, Joseph Grubb wrote a letter to the collector, informing him that the Superior was in the Bay of Delaware, having on board a cargo of goods of the growth, produce and manufacture of Great Britain, and he states that he gave this information in order that he may receive the proportion of any penalty or forfeiture to which he might be entitled by reason of his giving this information. That Thomas Little boarded the Superior near the Capes of Delaware, by instruction from the principal owners and consignees, and obtained a copy of the manifest to be given to the collector.

That on the 25th of August one of the Gun Boats and the Revenue Cutter were proceeding down the bay, the Gun Boat being ahead, at 7 o'clock in the morning, the Superior was boarded near Ready Island by——Smith, an officer of one of the Gun Boats, pursuant to the orders of Commodore Murray, commander of the flotilla then lying in Delaware Bay, by whom

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she was ordered to New Castle. About 11 o'clock of the same day she was boarded by Capt. Sawyer of the Revenue Cutter, who demanded the ships papers, and they were delivered to him by the master of the vessel: She was, ordered by Capt. Sawyer to the mouth of Christiana Creek. A contest arose between the officer of the Gun Boat and the officer of the Revenue Cutter, as to the destination of the vessel, and both remaining on board, she ascended up the river to New Castle, where the flotilla was stationed. Previous to her arrival off New Castle, Samuel Spackman, the owner, declared his intention to the Collector to order the Superior to Wilmington, and the Collector advised the Surveyor at New Castle, and the captain of the Cutter, of this circumstance. At New Castle, orders were given that she should be fastened to the pier, but this was prevented by an officer of the flotilla, who, aided by a number of his men, who were armed, forcibly carried her up the river to Philadelphia, the officer of the Revenue continuing on board. In this place it may not be improper, to remark, that the force used was in the absence of Com. Murray. If he had been present, in all probability it would not have taken place. Under these circumstances the Collector, consulting the District Attorney, was advised to take out a writ of replevin to recover the possession of the vessel, but as she had been carried out of the district, the writ could not be served. The attorney then, in the absence of the collector, ordered an action on the case, and directed the writ to be endorsed for bail, to the amount of $1,200,000 double the supposed amount of the vessel and cargo. The writ was served on Commodore Murray, and for want of bail, he was committed to jail by the Marshal. This proceeding is the ground of the present action.

It is made by law the duty of the collectors of the revenue to board or cause to be boarded, all vessels arriving from foreign parts within the limits of the U. States, or within four leagues of the coast, if bound to the U. States, for the purposes specified in the law; and it is the duty of the person on board to remain

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there until the vessel shall arrive at the port or place of destination.

Before the war a collision of this sort could not have happened. The authority of the collector was complete and exclusive. How far the existence of war authorized the commander of the armed vessels of the United States to capture merchant vessels belonging to citizens, which had arrived within the waters and jurisdiction of the United States, for a supposed violation of the non-importation act, is a question on which the opinion of the court is required.

The only question of difficulty is, whether the boarding by the officer of the gun boat, in the manner pursued, amounts to a capture as prize of war—*exclusive* of the boarding by the revenue officer, who demanded and obtained the ship's papers. No authorities having been cited on either side—we must decide the case as it is now before us.

There is no legal restraint on the officers of the navy to prevent them from boarding a merchant vessel belonging to a citizen in the waters of the U. States. Boarding for the purpose of examination is a legal act. Under the circumstances which have been stated, the court is of opinion that after the Superior was boarded by the commander of the revenue Cutter, who obtained possession of the ship's papers, he was in construction of law in possession of the vessel, and that she ought to have been delivered up by the officer of the flotilla: and that the carrying her out of the district by force was wrongful on the part of that officer, acting under the authority, as he conceived, of Commodore Murray.

It has been contended on the part of the plaintiff, and authorities have been produced to prove that in time of war, all trading with the enemy is unlawful, and that the goods of an ally or even of a citizen found trading with an enemy are lawful prizes of war, and confiscable as such. There can be no doubt that the law is so. If the Superior had been captured on the high seas trading with the enemy, or in violation of the laws of the U. States, the vessel and cargo without doubt would have been prize of war. Such, I con-

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ceive, was the case of the Sally, condemned by the decision of the U. States. I do not recollect particularly the facts in that case, but I have no doubt she was captured on the high seas—because she was captured by a private armed vessel whose right to capture is confined to the high seas. The case of the Nelly referred to in the opinion, was a captnre on the high seas. The reference in the opinion to the 4th, 6th, and 14th sections of the act of June 26, 1812, seems to imply a capture at sea. The words of the 6th section are, "And in the case of all captured vessels, goods and effects which *shall be brought within the jurisdiction of the U. States*, the district courts of the U. States shall have exclusive original cognisance thereof, as in civil causes of admiralty and maritime jurisdiction, &c."

In the case of the Sally it was contended by the Attorney-General on the part of the U. States—that as soon as she had on board her cargo with intent that the same should be landed in the U. States, they became forfeited, and that the forfeiture was complete and immediately attached, but the court was of a different opinion, and that she was lawful prize; there was no intervening claim in that case on the part of the revenue officer.

Seizures of vessels within the waters of the U. States, for violation of the non-intercourse act, are considered as properly belonging to the revenue officers. This appears by the instructions of the executive department, to have been the opinion of the government: and although the instructions were not received in time by Com. Murray to prevent this contest, yet this clearly shows the construction put upon the law by the navy department.

After seizure by the collector, the vessel and cargo are considered to be at his risque, and in case of loss by the neglect or omission of the collector, he is responsible to the owner. Hence the court is of opinion that, admitting the facts to be truly stated, there was probable cause for the suit, which was the ground of this action. It would be rigorous in the extreme to say that there was not probable cause for the original

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suit when the attorney for the district whom the collector was bound to consult, advised and directed the measure. And if it be admitted that the District Attorney was mistaken, it cannot alter the case as it respects probable cause, because if the case was of so doubtful a nature as that eminent counsel was mistaken, it affords a strong presumption that there was probable cause.

The court are, therefore, of opinion that there was a probable cause of action, and to the jury this case is now submitted.

The jury retired for about ten minutes, when they returned with a verdict in favour of the defendant.

SUPREME COURT. NORTH-CAROLINA

Crittenden v. *Jones.*

Taylor, Ch. J. The law, of which the defendant claims the benefit, was passed in 1812, and provides that any court rendering judgment against a debtor for debt or damages between the 31st of Dec. of that year and the 1st of Feb. 1814, shall stay the execution until the first term or session of the court after the latter period, upon the defendant's giving two freeholders as securities. The act contains sundry details, which it is not necessary to recite.

In deciding the momentous question, whether the will of the legislature, as expressed in this act, be incompatible with the will of the people, as expressed in their fundamental law, the constitution of the United States, we disclaim all right or power to give judgment against the validity of a legislative act, unless its collision with the constitution appear to our understanding manifest and irreconcileable. On the contrary, if patient and dispassionate consideration of

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the subject, produce any thing short of entire conviction, we hold ourselves bound to support a law.

The constitutional will of the legislature, inclination, not less than duty, prompts us to execute; for identified as its members are with the other citizens of the community, and faithfully representing their feelings and interests, we can never allow ourselves to think that the acts proceeding from them can be designed for any other purpose than the promotion of the general welfare; or can result from any other than the purest and most patriotic motives.

We have deliberately viewed the question in every light in which the arguments of the learned counsel on both sides have presented it, and aided by such additional information as our own research and reflection could furnish, the result of our opinion is that the law in question is unconstitutional, and cannot be executed by the judicial department without violating the paramount duty of their oaths to maintain the constitution of the U. States.

This conclusion we derive, 1st. From the plain and natural import of the words of the constitution of the U. States.

2d. From a consideration of the previously existing mischiefs, which it was the design of that valuable instrument to suppress and remedy.

1. Among the important objects which the people of the United States designed to accomplish by adopting the constitution, that establishing justice holds a conspicuous rank.—This appears from the solemn declaration of the people themselves in the preamble of that instrument. The enlightened statesmen, by whom it was originally framed, had reaped abundant instruction from history and experience. Long accustomed to contemplate the operation of those master principles and comprehensive truths, which form, at once, the defences and the ornament of human society; and which, alone, can justly form the basis of the social compact; they designed to give them practical effect, for the benefit of the American people—to consecrate and make them perpetual. They well knew that while the principle of justice is deeply root-

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ed in the nature and interest of man, and essential to the prosperity of states, it forms the strongest and brightest link in the chain, by which the author of the Universe has united together the happiness and the duty of his creatures.

To give a proper direction to these general principles, the clause in the constitution which presents the question before us, was inserted. Some of its provisions are transcribed from the articles of confederation; others are added because experience had demonstrated that without them the union of the states would be imperfect. The words are "No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," &c.

The obligation of a contract may be impaired by various modes and in different degrees; and the restrictive clause in the constitution does, according to our apprehension of its meaning, annul every act of a state legislature which shall, thereafter, produce that effect, plainly and directly, in any degree. When, therefore, the validity of the law is maintained by the defendant's counsel, because it does not allow a debtor, who promises to pay in one thing, to pay in another; because it does not absolutely restrain the debtor from paying according to his engagement; or because it does not allow a third person to interfere between the contracting parties;—the answer is, that the examples cited furnish stronger instances of a violation of the constitution than the case before us: they may with stricter propriety be called cases of annulling a contract—but they certainly do not prove that the obligation of contracts is not impaired by the act under consideration.

Whatever law relieves one party from any article of a stipulation, voluntarily and legally entered into by him with another, without the direct assent of the latter, impairs its obligation; because the rights of the creditor are thereby destroyed, and these are ever cor-

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respondent to, and co-extensive with, the duty of the debtor. The first principles of justice teach us, that he to whom a promise is made under legal sanctions shall signify his consent before any part of it can be rightfully cancelled by a legislature.

The binding force of a contract may likewise be impaired by compelling either party to do more than he has promised. If an act postponing the payment of debts be constitutional, what reasonable objection could be made to an act which should enforce the payment before the debt becomes due? If, notwithstanding the constitutional barrier, it is competent for the legislature to hold out to all debtors, that although they fail to pay their debts when they become due, and their creditors are, in consequence, compelled to sue them, they shall nevertheless be indulged with a certain time beyond the judgment, superadded to the ordinary delays of the law: may not the legislature, with equal authority, announce to all creditors the right of suing for their debts and enforcing payment before the day? Yet the rights of both parties, established by the contract, are, in the eye of justice, equally sacred; and whether those of the creditor are sacrificed to the convenience of the debtor, or the subject be reversed, we are compelled to think that the constitution is overlooked.

No unimportant part of the obligation of every contract arises from the inducement the debtor is under to preserve his faith. With many persons, and it may be hoped the greater number, a sense of justice and respect for character form motives of sufficient strength; but how rarely does it happen, that a man lending his money, or selling his property on credit, estimates such motives as highly as to deem them safe and exclusive ground of reliance! In most cases he would reserve both money and property in his own possession, were he not assured that the law animates the industry and quickens the punctuality of his debtor; and, that by its aid, he can obtain payment in six or nine months. Hence the well considered ceremonies of bonds, mortgages and deeds of trust, more useful as the instruments of coercive justice, than as pre-

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serving the evidence of contract. The act under view delays this assurance; and while it produces a state of things, the existence of which, at the time of contract, would have restrained the creditor from parting with his property, it encourages the debtor to relax his efforts to be punctual. It weakens his inducement to fulfil his engagement, and thereby impairs its obligation.

The right to suspend the recovery of a debt for one period implies the right of suspending it for another, and as the state of things which called for the first delay, may continue for a series of years, the consequence may be a total stagnation of the business of society, by destroying confidence and credit among the citizens.

An argument urged and much relied on by the defendant's counsel is, that the law in question bears on the remedy, and is, therefore, within the sphere of the legislative authority. But if in so doing it violates the constitution, it is not less invalid, than if it directly touched and annulled the right. Every one will argue, that a law, which should deny to all creditors the power of instituting the action of debt, covenant, assumpsit, or a bill in chancery, would invade the constitution; that a law which should limit the recovery of all debts to so short a period after its passage, that it would be impossible, according to the course of the courts, to obtain judgment, would also be void; though such laws ostensibly bear only on the remedy, yet they do, in reality, annihilate the right. The law before us, it is conceded, does not go to the extent of either instance, yet it certainly diminishes the importance and value of the right. It is difficult to conceive how a law could otherwise impair an existing right than by withholding the remedy; which is in effect to suspend the right.

The undoubted right of the legislature to alter and reform the judicial system may it is said, produce delay in the execution of a contract, equal to that which results from the present law: and it is urged that all such acts must upon the same principle be declared unconstitutional.

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We [*hiatus in MS.*] final conclusion drawn from these proceedings which, without hesitation, we acknowledge to be correct.

All such laws, the legislature have an unquestionable right to enact, a right which the people have never surrendered, and the exercise of which is not forbidden by the constitution of the United States.

But it must be considered that the primary essential object of all such laws is the promotion of the administration of justice, its advancement and improvement. If delay grows out of them; if any thing that bears the semblance of a violation of contract follows in their train; it is merely the unintended incident and consequence of the exercise of a lawful authority. It is different with the law before us: its very design, as expressed in the title, is to do that against which the constitution has opposed its veto.

Many analogous powers, it is agreed, have long existed in the state under the authority of the law; that their exercise has been highly convenient to the citizens, and has been universally acquiesced in; that all these must cease to have effect if the suspension law is unconstitutional, to the manifest detriment of the community.

If such effects follow from one decision, there are no citizens in the state who will more sincerely deplore them than ourselves. But we feel too deeply what we owe to the responsibility of our stations, to the obligation of our oaths, and the rights of the people and their posterity, to be turned aside from what we believe to be the path of duty, by any consideration of the consequences that may arise from continuing in it.

Let all these cases be patiently examined, and we think it will be seen that their analogy is not complete, and that they still exist and the powers under them be rightfully exercised, notwithstanding the decision in the present case.

The 1st instance is the stay of execution, which the justices are allowed to grant, upon judgments rendered by them. But here the creditor is not concluded; he may appeal to the county court. Besides, the con-

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stitution of the United States in the section under consideration employs the future tense. "No State shall pass laws," &c. It does not repeal those conflicting laws which were then in force; though several of the States did, in obedience to its spirit, forbear to re-enact laws in hostility with it. The law giving this power to magistrates was enacted long before the constitution was adopted.

Another example cited, is that of the power constantly exercised by a court of chancery, in giving time to a mortgagor, on a bill filed against him to foreclose, to pay the debt before the decree is made absolute, or the lands ordered to be sold.

Such a power has been exercised by that court from very ancient times, was one of the modes of administering a remedy on these contracts, known to the parties when entering into it, and is a necessary consequence of the principle on which the constitution of the court compels it to decide the rights of parties to a mortgage.

It is also in strict conformity with natural justice; for the land mortgaged being only a collateral security for the payment of the debt, and so understood by the creditor, he cannot be injured if his debt and interest are paid. It is upon the same principle, that a court of chancery exercises its jurisdiction of relieving against a penalty; because it is designed to secure the payment of money, and the court allows the creditor all that he expected when he made the contract. The intention of the parties is, in all respects, effectuated; and the obligation of the contract is enforced, precisely in the way both creditor and debtor knew it might be enforced, when they entered into it, another point of view may probably render the subject clearer. Such an order in the court of chancery is not at all directed against the contract; but it is the answer of the court to a mortgagee, who brings his bill against the mortagor, on whom it prays the court to lay hands, and make him if he intends to redeem do it, then, or ever after remain silent. When the court, therefore, is applied to for the purpose of lending its aid to an individual, in a matter which he deems necessary

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for his peace, it is clearly in its power to say upon what terms such interposition shall be extended. With the utmost propriety then, the court answers, " it cannot be, that a decree of foreclosure shall be made in the case, without giving reasonable time to the mortgagor to redeem." If there are special cases in which a court of chancery gives further time, upon a bill to redeem, it must be upon the ground that the substantial understanding and agreement of the parties is that of a security for the money and the interest accruing without having reference to any particular day of payment, and that the safety of the debt is only intended to be provided for by the mortgagee. Hence the mortgagee takes a bond for the debt, and the existence of the mortgage is no objection to the recovery of the debt. The giving further time on a bill to redeem has no influence on the bond, nor does it affect any proceeding to recover the debt in any court of law. Both jurisdictions move distinctly within the sphere of their respective orbits. The court of equity applies itself to the conscience, of the party, requiring of him substantially to accept and perform, what he originally expected, and what was intended by both parties; thereby *enforcing* rather than impairing the contract.

The act of 1789, has been pointed out to the notice of the court, as containing a similar exercise of legislative power with the one under consideration. That act provides that no execution shall be levied on the property of a minor in the hands of his guardian, until twelve months after a judgment on the *scire facias*.

An examination of the purview of this law will show that it is supplementary to the act of 1784, by which a remedy is given against heirs not formerly possessed by the creditor. The heir was at first liable only where he was expressly bound in the obligation of his ancestor, and had, also, assets by descent. By these laws which must be construed together, the land in the possession of the heir is made liable to creditors after the personal estate is exhausted. That a new remedy, given by the legislature, should be qualified and limited in any way they deem expedient, seems perfectly unexceptionable. Besides, to whom is the

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indulgence extended? To minors, whose rights the common law, even to a greater degree than equity, has always considered as under its peculiar protection. Its language is "in the case of infants the parol is to demur, and the infant is not bound to answer like full age, and the register, parliament and common law give no execution against an infant heir, although the debt were clear and indisputable as by a judgment or statute." 2 *Treatise on Eq.* 268.

The right to pass this law is further derived from the 5th section of the Declaration of Rights, "that all power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and *ought* not to be exercised."

This article, like several other excellent ones in the same instrument, is taken *mutatis mutandis* from the declaration of rights established by the Parliament of England at the beginning of the reign of Wm. III. and was especially designed to secure them against a branch of the prerogative, which though exercised by the legal authority from the time of Hen. III. had been employed in the preceding reign, in a manner the most odious and oppressive. With the example of the revolution in England, and the causes producing it, put in their remembrance, the convention of this state raised this bulwark against a similar assumption of authority. But the term, "Laws" must signify such acts as the legislature have authority to pass, for that cannot be called a law, which the constitution has forbidden to be enacted. The term "suspend" implies that the act suspended, once had an effectual and constitutional existence. So that if before the adoption of the federal constitution the legislature had passed an act inconsistent with the constitution of the state, such act could not claim the authority of a law. If, for example, they had directed the judiciary to try all criminals without the intervention of a jury; if they had declared certain acts theretofore done, and lawfully done should nevertheless be punishable; that no prisoners should be bailable; it would we apprehend, have been the sacred duty of the judiciary to refuse to exe-

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cute such acts. The persons who have filled that department, from the cessation of the colonial government to the present time, have acted in conformity with this principle, as the judicial records of the country testify. A law is defined a rule of action commanding what is right and prohibiting what is wrong. But the rule prescribed in the supposed cases would have commanded what was wrong, and prohibited what was right, according to the fundamental law. Every article in the Declaration of Rights, as well as the constitution of the state, is subject to the paramount control of the constitution of the United States, which being the last solemn expression of the will of the people, annuls and destroys every thing clearly irreconcileable with it.

The definition of a contract as given by M. Pothier, a writer on the civil law, is quoted to show that the time of payment is not of the essence of a contract. The writers on that law have made various subtle distinctions relative to the qualities of a contract; but as we cannot perceive that any inference can be drawn from the words of Pothier applicable to this subject, except such as other parts of the work explain away, a very brief notice of it will be sufficient. His words are, "there are three different things to be distinguished in every contract, things which are of the essence of a contract; things which are only of the nature of the contract; and things which are merely accidental to it." After explaining at length the essence and the nature of the contract, he illustrates what he means by the accidental things, which, he says, are only included in the contract by express agreement. "For instance, the allowance of a certain time for paying the money due; the liberty of paying it by instalments, that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract, because they are not included in it, without being particularly expressed." The just inference from this passage is, that accidental things, if inserted in the contract, form a part of its obligation. That the civil law viewed them in this light is evident from other parts of the same

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writer, where he distinguishes between a term of right and a term of grace; the first making a part of the agreement, the latter not.—1. *Pothier, P.* 11, *Chap.* 3, 131, *Evans' translation.*

To this statement of the reasons why the analogy of the cases relied upon appears to us imperfect, it is only necessary to subjoin this general remark that none of them have been directly brought into judgment; and if they should appear to be infringements of the constitution, it cannot follow that the acquiescence in them will justify a repetition. The construction we give to the constitution would have been adopted by us from a consideration of the instrument itself; but we think it fortified by the collateral *illustration* furnished by the other ground of our *opinion.*

2. It is to be seen in the political records of some of the states, that pressed and exhausted by their efforts in the great struggle for independence, they had recourse to various expedients to relieve their suffering citizens. In addition to the issue of bills of credit and paper money, some laws were passed wholly changing the nature of the contract; others postponed the payment of debts by authorizing it to be made in instalments. The benefit resulting from these measures was partial and temporary; but the evil, as might have been expected, universal and permanent testimonies of this might be adduced from various authorities; but it may be sufficient to cite the work of the able historian of S. Carolina, whose various labours in the cause of literature, entitle him to the gratitude of the country. As the work of this gentleman may not be in the hands of every one who may desire to know the grounds of our opinion, such parts of it will be transcribed as immediately relate to the subject.

"The people of South-Carolina had been but a short time in the possession of peace and independence, when they were brought under a new species of dependence. So universally were they in debt beyond their ability to pay, that a rigid enforcement of the laws would have deprived them of their possesions and their personal liberty, and still left them under incumbrances; for property when brought to sale un-

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der execution, sold at so low a price as frequently ruined the debtor without paying the creditor. A disposition to resist the laws became common. Assemblies were called oftener and earlier than the constitution or laws required. The good and evil of representative government became apparent. The assemblies were a correct representation of the people. They had common feelings, and their situation was in most cases similar. These led to measures which procured temporary relief, but at the expence of the permanent and extended interests of the community. Laws were passed in which property of every kind was a legal tender in the payment of debts, though payable according to contract in gold and silver. Other laws installed the debt, so that of sums already due, only a third, and afterwards only a fifth, was annually recovered in the courts of law."

After stating the emission of paper money, he proceeds thus:

"The effect of these laws interfering between debtors and creditors were extensive. They destroyed public credit and confidence between man and man; injured the morals of the people, and in many instances insured and aggravated the final ruin of the unfortunate debtor for whose temporary relief they were brought forward. The procrastination of payment abated exertions to meet it with promptitude. In the mean time interest was accumulating, and the expences of suits multiplied by the number of instalments."

He then states the necessity of the constitution of the United States, the objects provided for by it, and particulary recites the clause under consideration; after which he proceeds:

"Their acceptance of a constitution, which among other clauses, contained the restraining one which has been just recited, was an act of great self-denial. To resign power in possession is rarely done by individuals, and more rarely by collective bodies of men. The power thus given up by South-Carolina, was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquish-

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ment she would not have made at any period of the last five years, for in them she had passed no less than six acts interfering between a debtor and creditor, with a view of obtaining a respite for the former, under particular circumstances of public distress. To tie up the hands of future legislatures, so as to deprive them of the power of repeating similar acts on any emergency, was a display both of wisdom and magnanimity. It would seem as if experience had convinced the state of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used."

Upon examining the laws of South-Carolina, it appears that the last act alluded to by the historian, as interfering between debtor and creditor, was passed the 4th November, 1788. It provides that all debts (with various exceptions) contracted previous to the first of January, 1787, shall be receivable in instalments. Only one fifth to be paid annully on the 25th of March; in each succeeding year until the whole is paid. The law also authorizes the creditor to demand security.

In the course of an animated picture, traced by the historian, of the effects of the new constitution, he remarks, "Public credit was re-animated, the owners of property and the holders of money freely parted with both, well knowing that no future law could impair the obligation of contracts." 2—*Ramsay's History of South-Carolina, page* 483.

In page 440, the same author in describing the effects of the embargo in 1807, remarks:

"Though the prohibiting of exporting the valuable commodities of the country reduced their price one half, yet the courts and the legislature firmly resisted all attempts to obstruct the legal course of justice in favour of debtors. The forbearance of the creditor part of the community generally afforded a shield to property bound by judgments and executions, which, without violating the constitution protected it more effectually than the instalment laws, which had been too easily passed in the period of disorganization preceding the establishment of energetic government in 1789."

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No comment on these extracts is necessary to prove that in the opinion of the writer, the instalment law, could not have been re-enacted after the adoption of the constitution. They may also fairly be considered as furnishing evidence of the sentiments of a respectable state on the same subject, expressed at two different periods, a state which has always abounded with able men at the bar, on the bench, and in the legislature.

The same opinion is to be collected from the debates in our convention in 1788, as having been entertained by some eminent citizens who assisted in forming the constitution, and were present at all the discussions it underwent in the general convention. Whoever will compare an instalment law with a suspension law at the time of their enactment, will probably be induced to give the preference to the former, in relation to the rights of the creditor; and to conclude that if the former violates the constitution *a fortiori*, the latter does so.

We have thus given the reasons of our opinion with as much clearness and brevity as the many important causes pressing upon our attention would enable us to do in the intervals of adjournment. For until the present term we know not the opinions of each other. We should have rejoiced if this judgment could have been put in a course of revision before a superior tribunal, or that so interesting a question could have been decided for the first time, by judges of more skill and learning than we pretend to possess. Such as it is, we submit it to the candor and good sense of our fellow citizens, who, although they may think us in error, to which we are subject in common with the rest of the human family, will do us the justice to believe that such error is neither wilful nor agreeable. We have discharged what we believe to be an imperious duty to our country, and the *mens conscia recti* forms our consolation and support.

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Habeas Corpus.

VIRGINIA.

In the matter of *William Meade* May, 1815.

MARSHAL, Ch. J. By the return of the deputy marshal, it appears that Wm. Meade, the petitioner, was taken into custody by him and is detained in custody, on account of the non-payment of a fine of 48 dollars, assessed upon him by the sentence of a court martial, for failing to take the field in pursuance of the general orders of the 24th of March, 1813, the marshal not having found property whereof the said fine might have been made.

The court martial was convened by the following order:

November 8th, 1813.

BRIGADE ORDERS.

A general court martial to consist of Lt. Col. Mason, President, &c. will convene at the court house in Leesburg on Friday the third day of next month, for the trial of delinquencies which occurred under the late requisitions of the governor of Virginia and Secretary of war, for militia from the county of Loudoun.

(Signed) HUGH DOUGLASS,
Brig. Gen. 6th Regt. of V. M.

The court being convened the following proceedings were had.

It appears to the satisfaction of the court that the following persons of the county of Loudoun were regularly detailed for militia duty, and were required to take the field under general orders of March 24th, 1813, but refused or failed to comply therewith, whereupon this court doth order and adjudge that they be each severally fined the sum annexed to their names as follows, to wit: William Meade, $48, &c.

On the part of the petitioner the obligation of this sentence is denied.

1st. Because it is a court sitting under the author-

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ity of the State and not of the United States. 2nd. It has not proceeded according to the laws of the State, nor is it constituted according to those laws. 3d. Because the court proceeded without notice.

1st. The court was unquestionably convened by the authority of the state, and sat as a state court. It is however contended that the marshal may collect fines assessed by a state court for the failure of a militia man to take the field in pursuance of the orders of the President of the United States. The Constitution of the United States gives power to Congress "to provide for calling forth the militia to execute the laws of the Union," &c. In the execution of this power, it is not doubted that Congress may provide the means of punishing those who may fail to obey the requisitions, made in pursuance of the laws of the Union, and may prescribe the mode of proceeding against such delinquents, and the tribunals before which such proceedings shall be had. Indeed it would seem reasonable to expect that all the proceedings against delinquents should rest on the authority of that power which had been offended by the delinquency—This idea must be retained while considering the acts of Congress. The first section of the act of 1795, authorizes the President, whenever the United States shall be invaded, or in imminent danger of invasion, to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the United States as he shall think proper." The 5th section enacts "that every officer, non-commissioned officer and private of the militia, who shall fail to obey the orders of the President of the United States in any of the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial." The 6th section enacts "that courts martial for the trial of militia shall be composed of militia officers only." Upon these sections depends the question whether courts martial for the assessment of fines against delinquent militia men

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should be constituted under the authority of the United States, or of the State to which the delinquent belongs. The idea originally suggested, that the tribunal for the trial of the offence should be constituted by or derive its authority from the government against which the offence had been committed, would seem to require that the court thus referred to in general terms, should be a court sitting under the authority of the United States. It would be reasonable to expect, if the power were to be devolved on the court of a State Government, that more explicit terms would be used for conveying it—and it seems also to be a reasonable construction that the legislature, when in the 6th section, providing a court martial for the trial of militia, *held* in mind the offences described in the preceding section, and to be submitted to a court martial. If the offences described in the 5th section, are to be tried by a court constituted according to the provisions of the 6th section, then we should be led by the language of that section to suppose that congress had in contemplation a court formed of officers in actual service, since the provision that it should be composed "of militia officers only," would otherwise be nugatory. This construction derives some aid from the act of 1814. By that act, courts martial for the trial of offences, such as that with which Mr. Meade is charged, are to be appointed according to the rules prescribed by the articles of war. The court in the present case, is not so constituted. The only argument which occurs to me against this reasoning, grows out of the inconvenience arrising from trying delinquent militia men, who remain at home, by a court martial composed of officers in actual service. This inconvenience may be great, and well deserves the consideration of Congress; but I doubt whether it is sufficient to justify a judge in so construing a law as to devolve on courts, sitting under the authority of the state, a power which in its nature belongs only to the United States. If, however, this should be the proper construction, then the court must be constituted according to the laws of the State.

On examining the laws of Virginia, it appears that

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no court martial can be called for the assessment of fines, or for the trial of privates not in actual service. This duty is performed by a court of inquiry, and a second court sit, to receive the excuses of those against whom a previous court may have assessed fines, before the sentence becomes final or can be executed. If it be supposed that the act of Congress has conferred the jurisdiction against delinquent militia privates on courts martial constituted as those are for the trial of officers, still this court has proceeded in such a manner that its sentence cannot be sustained. It is a principal of natural justice with which courts are never at liberty to dispense, unless under the mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard. There is no law authorizing courts martial to proceed against any person without notice, consequently such proceeding is entirely unlawful. In the case of the courts of enquiry sitting under the authority of the state, the practice has I believe prevailed, to proceed in the first instance without notice; but this inconvenience is in some degree remedied by a second court, and I am by no means prepared for such a construction of the act as would justify rendering the sentence final without substantial notice. But be this as it may, this is a court martial and not a court of enquiry, and no law exists authorizing a court martial to proceed without notice. In this case the court appears so to have proceeded. For this reason I consider its sentences as certainly nugatory, and do, therefore, direct the petitioner to be discharged from the custody of the marshal.

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NEWYORK COUNCIL OF REVISION.

22nd October, 1814.

Present,
The GOVERNOR,
Mr. CHANCELLOR KENT,
Mr. CHIEF JUSTICE THOMPSON,
Mr. JUSTICE SPENCER.

Mr. Chancellor objected to the bill entitled "an act to authorize the raising of troops for the defence of this state," as inconsistent with the spirit of the constitution and the public good;

1st. Because the constitution of the U. States has granted to Congress the power to raise and support armies, and with it the exclusive power to lay and collect imposts, and the concurrent power to lay and collect taxes, duties, and excises, in order to provide for the common defence and general welfare. After such a transfer of power, and of the best resources of the state, the raising immediately so large an army as 12,000 men, and at the sole expense of the people of this state, so far as respects the organization, bounty and equipment of the corps; and which alone, according to the terms of the bill may amount to nearly, or quite two and an half millions of dollars, is an undue, disproportionate, and most burdensome contribution for the common defence. The individual states as states have nothing to do with the war except for the mere purpose of self-protection. The entire power of creating, conducting and concluding war, and with it the correspondent duties and responsibilities are confided exclusively to the government of the U. States. Nor do the provisions of the bill correspond with its title, for the troops so raised are to be placed for two years under the command and at the disposal of the government of the U. States, without any restriction as to place or object, and who may accordingly employ them where they please, and upon such projects of conquest as may suit the policy of

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the government, while the defence of this state from actual invasion may, in the mean time, be left to be borne by its remaining citizens.

2dly. Because the mode of raising the army by compulsory assessments and drafts, would be unjust, unequal, and grievously oppressive in its operation. The poorest counties in the state must raise as many soldiers in proportion to their population as the most wealthy. This bill is not intended for the case of an occasional draft or detachment of a portion of the militia for some sudden and pressing emergency, according to the hitherto received policy of our mild militia systems, and which were never intended to change essentially the free and independent character of citizens. The scheme of this bill is to transfer forcibly, and by military law, citizens into soldiers for long national service, and thereby breaking up probably for ever all their plans of usefulness, and the manners, and morals, and habits of domestic life. And this new plan of raising an army appears to be as unnecessary as it is alarming. It is hardly to be supposed that the government of the U. States, if it really deserves and retains the affection and confidence of the nation, cannot raise by voluntary enlistments, and on reasonable terms, a force adequate to all the just purposes of national defence. Nothing, however short of extreme necessity can justify any government, and especially the government of a free people, in raising armies by means so vexatious, revolting, and arbitrary as those proposed by the present bill, and which cannot but remind us of its analogy in two many of its details, to the memorable code of the French conscription: and which, as it is well known to the world, produced the most intolerable miseries in France.

3dly. Because the bill does not allow of any exemption from detachments for personal service as common soldiers in this army, to persons who may have heretofore borne military rank, or who are still officers in the militia, nor to aliens of any denomination or description, nor to the professors and pupils in our seats of learning, nor to any of the existing civil

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officers of the government of this state, however exalted in station or venerable in character; while all the civil officers of the government of the U. States are exempted by the law of Congress, and by the provisions of this bill. The painful consequences of such indiscriminate requisition may be felt but cannot be described. It follows that the ordinary duties of government, and even the administration of justice may be suspended, and an odious and degrading distinction is created between the officers of the two governments, though the same official characters in each are equally important to the public welfare, and ought to be equally protected in the exercise of their functions.

4thly. Because the bill provides that the governor shall appoint by brevet all the officers of this army, and who are authorized to act and to hold their rank until the council of appointment shall have made the appointments. This is a direct violation of the 23d article of the constitution of this state, which declares "that all officers other than those who by the constitution are directed to be otherwise appointed, shall be appointed by the council."—There is the less necessity for this breach in the constitution, and for the creation of such immense patronage and unwarrantable power in the governor, since there is an existing council ready and competent to perform their duty.

5thly. Because by the bill if a person has property situated in two or more counties, the property in the county in which he does not reside is made liable, under the name of non-residem property, to assessment for its proportion of the bounties in that county, though such owner is also charged with his proportion of the assessment of the class in which he belongs and resides "agreeable to his estate, circumstances and abilities." By this means he becomes doubly taxed, contrary to the most obvious principles of equality and justice, and the lands for which he becomes thus amerced to procure a soldier are at the same time wholly unproductive of revenue, and as little liable to be affected by any incursion of the enemy, as they are by the wild beasts which now inhabit them.

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The question being taken on the bill, it passed notwithstanding the objections, by all the members present, except the Chancellor.

MISSISSIPPI TERRITORY. IN ADMIRALTY.

The United States, v. *Sch. Active and cargo.* } *December,* 1814.

Toulman, J. This is the case of a vessel and cargo belonging to the enemy taken in sight of the fort at Mobile Point, by the troops stationed at that place under the command of Major Wm. Lawrence. It appears from the testimony of two of the persons who boarded the vessel, that a boat with six men was sent out by the commanding officer to examine a vessel which on approaching, they found to be British: that after being fired upon by the fort, she was boarded and taken without opposition, at the distance of about a mile, or perhaps more, as one of them says—or about two miles, as the other thinks: that she was under British colours—that the persons on board acknowledged themselves to be British subjects, and said they were detached from the Sea Horse to bring the Schooner Active and cargo (consisting of flour captured at Alexandria) to Pensacola; and that the crew, consisting of six men, were armed with muskets, cutlasses and pistols. The log book shows her to be British. The libel prays the condemnation of the vessel and cargo as good and lawful prize to the U. States. A plea however is filed by Lewis Judson, (in the character of consignee and agent for the captors,) to the jurisdiction of the court, on the ground that as this court has jurisdiction only in cases in which he U. States are parties, it cannot legally entertain a suit in which the private captors, (as it is alleged,)

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are the only parties who have a right to claim the captured property. The said plea farther alleges that the "schooner Active and cargo were captured by Wm. Lawrence and others on the high seas, and not in the enemy's forts, camps, or barracks, and, therefore, by the usages of the laws of nations and the laws of war, as enemy's property, become forfeited to the said private captors."

No question has been made as to the *regularity** of the plea nor as to the legitimacy of the conclusion, that the government is in no sense to be regarded as a party, if the proceeds of a capture are suffered to go to the troops engaged in making the capture; but the whole has been liberally left by the attorney† prosecuting on behalf of the U. States, to depend on the simple question whether the troops of the U. States thus making a prize, are entitled by law to the benefit of it? The general belief that they are so entitled, the want of a knowledge of correspondent cases, and the little attention which, in this part of the country, we have had occasion to give to inquiries of this nature, have apparently created doubts even in the mind of the attorney acting for the U. States, and have rendered both parties desirous that the question should be judicially settled. The most satisfactory mode probably of coming to a conclusion on this subject will be to have recourse to general principles.

"1. What is war? It is a contest, (says Bynkershock,) carried on between independent persons for the sake of asserting their rights." Where society does not exist—where there is no such institution as that which we call *government*, there individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. (Bink. on the law of war, p. 128.) If war then be the act of the nation; whatever is done in the prosecution of it, must either expressly or implicitly be under the na-

* See Bee's Reports, p. 9. † Mr. Haines.

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tional authority. Whatever private benefits result from it, must be from a national grant. "War (says Vattel, p. 368.) is that state in which a *nation* prosecutes its right by force." The right of making war, belongs alone to the sovereign power. Individuals cannot control the operations of war, nor commit any hostility, (except in self defence,) without the sovereign's order.

"The generals, (adds that writer,) the officers, the soldiers, the partizans, and those who fit out private ships of war, having all commissions from the sovereign, make war by virtue of a particular order. And the necessity of a particular order is so thoroughly established, that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy, instead of sparing them. hangs them up as so many robbers or banditti. This is the case with private ships of war. It is only in virtue of a commission granted by the sovereign or his admiralty, that they are entitled to be treated like prisoners taken in a formal war." (Vattel p. 365, 6.) If then on the general principles of civil society, the whole operations of war depend upon the will and authority of the government, surely the appropriation and distribution of the property acquired in consequence of those operations, must equally be subject to the control of the government, and depend on those regulations which it may establish.

2. What indeed is *the object* of war? Is it to aggrandize individuals, or is it to maintain the rights of the nation? "The just and lawful scope of every war, (observes Vattel, page 280.) is to revenge or prevent injury. If to accomplish this object, it be expedient to encourage individual warfare, by granting all the profits arising from it to the parties engaged, the nation has a right to promise this encouragement; but until this encouragement he actually offered, it must follow that every thing which is required by individuals, whether acting as private persons or as a part of the public force, must belong to the nation under whose authority they act."

3. What rights are acquired by a state of war? "A nation (says Bynkershock, p. 4.) who has injurred ano-

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ther is considered, with every thing that belongs to it, as being confiscated to the nation which receives the injury." The rights accruing, therefore, are national altogether. They are not individual rights. The case seems analagous to that of the internal administration of justice. A civil society—a nation—has the right of punishing those who are guilty of violating the public laws. Though the guilty be members of their own community, they may forfeit their property or their lives. But the right of the body politic does not attach itself to the individual members of it. The nation, indeed, *might* authorize individuals to take the lives or the property of known offenders—but without an authority delegated by the nation, individuals have no such right. A right in private peersons *to avenge* violations of the law does not follow as a natural consequence from the circumstance of their being members of the great political body. On the contrary the very same act which would be retributive justice when emanating from the sovereign power, would become murder or robbery in the individual. Why should it be othewise, as it regards our intercourse with other nations? Why should a nation be less jealous of its rights, with regard to hostile nations than with regard to hostile individuals—why less jealous when they are encroached upon on a large scale, than when they are encroached upon on a scale truly small and insignificant? And even admitting that in the one case the public authority permits an individual to execute the sentence of the law, and in the other to attack and vanquish the public enemy; it will not follow that in either case the property of the enemy is to become the property of the individual by whom the national will is carried into execution. This it should seem must depend on express stipulations made in behalf of the nation. Agreeably to these principles, the celebrated M. De Vattel, after observing that a nation has a right to deprive the enemy of his possessions and goods, of every thing which may augment his forces and enable him to make war, goes on to remark, that *booty* or the moveable property of the enemy taken in war, belongs to the sovereign making war, no less

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than his towns and lands: for he alone—*(the sovereign authority,)* has such claims against the enemy, as warrant him to seize on his goods, and appropriate them to himself. His soldiers, (he adds,) are only instruments in his hand, for asserting his right. He maintains and forms them. Whatever they do, is in his name and for him. (Vattel 335.) These principles are equally applicable to every form of government. It is perfectly immaterial with whom the sovereign authority resides. With whomsoever it resides, its power is erected on the doctrine of its being the legitimate representative of the nation—and the rights of the nation are not surely to be considered as being less, under a republican, than under a monarchical form of government.

The nation, however, as I have observed before, may give a bounty to individual captors—may relinquish a part of its rights to those who fight under its banners. Agreeably to this, the same writer goes on to observe that "the sovereign may grant to the troops what share of the booty he pleases. At present most nations allow whatever they can make on certain occasions, *when the general allows of plundering* what they find on enemies fallen in battle; the pillage of a camp when it has been forced, and sometimes that of a town taken by assault." The cases here enumerated, seem to be those where either the object was too trifling to become a matter of national attention, or, where the services previously rendered by the troops, called for a degree of vigour and exertion which would merit extraordinary encouragement. The whole, however, is made to depend on the *will of the nation*, expressed through their commanding general. The soldier *(*he adds*)* in several services has also the property of what he can take from the enemy's troops, when he is on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of provisions or forage, which are applied to the wants and use of the army." He then goes on to observe, that when even this custom is introduced into an army, the same right should be allowed to auxiliaries as to the national troops; but proceeds to inform us, that

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among the Romans, the whole booty was carried to the public stock, and sold under the direction of the general, who then gave a part of the proceeds to the soldiers, and remitted the rest to the public treasury, (Vattel 355, 6.) It is evident from the whole strain of this passage, that the author is not attempting to lay down general principles by which nations are *to be governed* in the disposition of property taken from an enemy; but, is merely describing the *practice* of different nations. *In several services*, says he, that is in the service of several governments, the soldier has, on certain occasions, the property he takes from the enemy; but it was otherwise, he adds, among the Romans.

I have been more particular in stating the *principles* laid down by writers on the law of nations, (or the dictates of justice and common sense, as applied to national intercourse,) because the attorney for the claimant, whilst acknowledging that the laws of the U. States are silent on the present case, places a great reliance on the injunctions of national law. It is contended that the law of nations gives the booty in this case to the captors, and the principal authority appealed to, is that passage in Vattel, which I have just quoted, where, as I conceive, he is simply narrating the usages of some governments, and not laying down principles which are *binding* upon all.

What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or in the words of the author last cited, "the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." (Vattel 49.) It is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another—nor can it control the conduct of nations towards their own citizens, except in cases involving the rights of other nations. Property once transferred by capture, must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property must de-

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pend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the control of a system of laws which has respect to the laws and duties of nations towards one another. What our author states as to the practice of nations towards their own citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens, must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances under which prizes may be taken, but what is to become of them when taken under the sanction of that law, cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. It is by a reliance on the authority of their nation, that they shelter themselves from the charge of robbery or piracy. The sovereign, however, may distribute the booty as he pleases. He may do it by a general law, or by special regulations, issued by his generals, subject to the emergency of the case; provided the form of government admits of such a delegation of authority. Even the property acquired by privateers, depends on stipulations made with the supreme power of the country to which they belong. "Persons (says *Vattel*, p. 367.) fitting out ships to cruize on the enemy, in recompense of their disbursements and the risk they run, acquire the property of the capture: but they acquire it *by grants of the sovereign who issues out commissions to them.* The sovereign either gives up to them the whole capture or a part—this depends on the contract between them." (*Vattel*, p. 367.) As to those who without any authority from their sovereign, commit depredations by sea or land, they are regarded as *pirates* and *plunderers*, and things taken by them do not thereby undergo a change of property. (*Bynkershoek*, p. 127.) The discussion therefore entered into by Bynkershoek in his 20th chapter, respecting captures made by vessels not commissioned, for the purpose of determining whether they should belong

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to the owner of the ship, the mariners, or the shipper, (and on which a good deal of stress has been laid in argument,) has really but little or nothing to do with the present case. That writer having previously laid down the established doctrine about robbery and piracy; proposes in his 20th chapter to examine to whom a prize would belong which was taken by a non-commissioned vessel, *attacked by the enemy*, and in her own defence, seeing the enemy's vessel making the attack. He seems to take it for granted, that the government would put in no claim under such circumstances: and *under this supposition*, is merely canvassing the respective claims of the sailors, the shipper, and the owner. He afterwards states an objection which may be raised against him in the following words:—

"It will be said, perhaps, that I am wasting words on an idle and useless question, as it is *unlawful to* make captures without a commission from the states-general, or the admiral; and so far from the one who takes a prize without such a commission being entitled to it, he is rather to be considered as a pirate, agreeably to the principles which I have above contended for." (p. 161.) He then quotes Grotius, to show, that a prize *taken under circumstances of necessity*, belongs to those who take it.

The doctrine, therefore, which he contends for, has relation simply to the case of a mercantile vessel, which *being attacked* at sea by the enemy, successfully resists the attack and makes a prize of the adverse party. It has clearly no relation to the case now before the court. His reasonings have in general a reference to the laws of the states-general of the United Provinces; and the learned translator in a note upon this chapter seems to state the discussion of the author as founded on the *supposition* merely, that any persons, *other than the sovereign of the captor*, may be considered as entitled to the prize. (p. 156.) Again, in a note at the end of the chapter, he observes:—"In France and Great Britain, prizes taken by non-commissioned vessels belong to the lord high admiral, as a *droit* of his office. No distinction is made whether the captor did, or did not make

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the capture in his own defence, or from some other justifiable motive. But as in Great Britain the office of high admiral is vested in the king, and has for a long time been executed by commission, suitable rewards are given, *at the discretion of the government*, in meritorious cases." (p. 162.)

The English law on this subject seems to be pretty clearly laid down in the course of argument on the case of Lord Camden against Home and others —and I do not observe any thing in the decision of the court to impeach its accuracy. "Whatever is taken by any of the king's subjects from an enemy in the course of naval operations, appertains to the king, either as a *jure coronæ*, or as a *droit* of admiralty, according to the circumstances. If taken by a private ship, without any commission from the king, the prize belongs to him as a *droit* of admiralty. If such a ship had a commission, only one tenth of the prize belongs to the king as a *droit* of admiralty, and the rest is the property of the owner of the privateer. But where the capture is made by the king's ships or forces, the property is vested in the king's *jure coronæ;* and in such cases it is judged by the admiralty *lawful prize to the king*. But that adjudication by no means imports the capture to have been made by the king's *ships* exclusively—for if it were made by his *forces*, the adjudication would be the same. Now there are three sorts of joint captures:—one by the king's ship and privateer, with letters of *marque*—the distribution whereof is made, according to the number of persons on board the several ships—the king's share being adjudged to him in the *jure coronæ*. The second instance is of a capture by the king's ship and a *non-commissioned* privateer. There the king is entitled to the whole:—to the privateer's part thereof, it is a *droit* of admiralty, and the other in *jure coronæ* according to the same mode of distribution. The third is the instance in question, of a capture by the king's army and navy conjointly; and there the whole rests in him *jure coronæ*." (4 *Term Rep.* 387.)

Agreeably to this statement, we find that Sir William Scott granted a monition against the master and

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owner of a privateer not commissioned against the Dutch, to bring in the proceeds of a Dutch prize. The party appearing acknowledged that he had no commission, but prayed to be admitted as a joint captor. The court did not even suffer the case to be argued, but observed:—"The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any services he has performed, they may be represented to the admiralty.

"The former proceedings (of condemnation at Jamaica) on the part of the non-commissioned captor, are mere nullities; and the property must be proceeded against as droits of admiralty." (4 *Rob. Rep.* p. 59.) The case of the Rebecca, which was a question of interest in the capture of a vessel made by naval officers from the island of St. Marinou, a naval station, used for the temporary accommodation of the crews of ships of war, gave occasion to remarks from Sir William Scott, very applicable to the case now before me. "I accede, says he, entirely to what has been laid down, that a capture at sea, made by a force upon land, (which is a case certainly possible, though not frequent,) is considered generally as a non-commissioned capture, and inures to the benefit of the lord high admiral.

"Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a *droit of admiralty*, and the garrison must be content to take a *reward from the bounty of the admiralty*, and *not a prize interest*, under the king's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorising them to take, upon that element, for their own benefit. I likewise think, cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet en-

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title the admiralty, and not themselves, by a capture made upon the sea, by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man of war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, and by means thereof, compelled such ship to strike. I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a droit of admiralty, and nothing more." (1 *Robin. Rep.* p. 197.)

Another case in which the right of a party not commissioned for the purpose, to share in a prize, came into view, was that of the Providence, a commissioned vessel, and the Spitfire, a vessel not commissioned, against the Dutch, and who jointly took a Dutch ship.

The judge of the high court of admiralty gave to the Spitfire half the share she would have been entitled to, if she had been commissioned—but the lords of appeal pronounced the whole share of the Spitfire liable to confiscation, as a droit or perquisite of admiralty. And yet, in this case the Spitfire had not only applied for letters of *marque*, but had obtained a warrant for them to the judge of the admiralty, who on account of the pressure of business, did not issue them till the day after the capture. (2 *Rob.* 235—note.)

An English act of parliament provides, "that in all conjunct expeditions of the navy and army against any fortress upon the land, directed by instructions from his majesty, the flag and general officers and commanders, and other officers, seamen, marines and soldiers, shall have such proportionate interest and property, as his majesty, under his sign manual, shall think fit to order and direct." (2 *Rob.* 237.)

The prize act of the 21st George III. gives to the officers, seamen, and soldiers, &c. *on board* every ship and vessel of war in the king's pay, the sole interest in prizes taken by them. (4 *Term. Rep.* 391.) It should

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seem as if their courts adhered pretty strictly to the words of their laws in adjudging to whom captured property belongs, and took care to give it to the crown, where there is any doubt about the right of individuals.—Thus, in the case of ships taken at Genoa, which were given up on the payment of £17,000 by the owners, Sir William Scott said, "I am not aware that the prize act authorises me to condemn *to the captors*, in such a case as the present. The act gives them *ships*, *goods*, &c. *afloat*. This is a sum of money, which is not exactly of that description of things."

On this account, and another which he mentions, he made the condemnation pass to the crown. (4 *Rob.* 329.)

In the course of argument in the case before me, the counsel for the military force at Mobile Point, laid some stress on the observations of Sir William *Scott* in the case of the Dordrecht, which was a case of joint capture between the army and navy, and where the judge seemed to admit that there might be grounds for making the condemnation partly to the benefit of the army, although the cases did not come within the provisions of the act of parliament, which directed the army to share, in some case, in conjunction with the fleet. It has from hence been concluded, that a condemnation might have been made to the army under the law of nations. It is possible however, that there are other British statutes, besides the 33d of Geo. III. (the statute there referred to) under which the army preferred its claim. It may have been built on some royal proclamation: but that it *could not have been* founded on the law of nations, or on any general principles growing out of a system of national law, must surely be sufficiently apparent from the observations and authorities which have already been brought into view.

But the main stress seems to be laid on the consideration that the duty of the army is to fight on the land—that our troops are employed for that especial purpose—that land forces are not required to fit out boats and go to sea, and that fortune having thrown this prize in their way, it ought, on the principles of

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national law, to be condemned to their benefit. The view, however, which has been already taken of the law of nations, and the objects to which it can apply, seems to take off the weight of this argument. And how much soever one may regret that the gratification is not within the reach of this court to be the medium of awarding a prize to the gallant defenders of Fort Bowyer; it is its duty not to interfere with the prerogatives of the legislative or executive branches of the government; and it must not be disguised, that if the troops at the fort were not, as it seems to be alleged, under any obligation of noticing the approach of an enemy, unless it were made on *terra firma;* if every thing done to obstruct or capture the enemy on the sea, were merely gratuitous, and beyond the line of their duty, (a doctrine which those gallant men themselves most certainly never would advance,) then their conduct in so transgressing their line of duty would rather stand in need of apology than of reward. "Soldiers (says *Vattel*, p. 367) can undertake nothing without order, either express or tacit, of their officers. Obedience and execution are their province. They are not to act from their own opinions. They are only instruments in the hands of their commanders. Let it be remembered here, that by a tacit order, I mean the substance of what is included in an express order, or in the functions committed to us by a superior; and what is said of soldiers must also be understood of officers, and of all who have any subaltern command: Thus with respect to things the care of which is not committed to them; they may both be compared to mere private persons, who are to undertake nothing without order. The obligation of the military is still more strict, as the laws of war forbid expressly acting without order: and this discipline is so necessary, that it scarcely leaves any thing to presumption.

"To fight without command, is almost always considered in a soldier as fighting against commands, or against the prohibition."

For my own part I do not believe that our valiant soldiers, who but a short time before so much dis-

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tinguished themselves at Fort Bowyer, would be considered with regard to this vessel as fighting without command. A fort so situated, on a narrow, barren point of land, unconnected with any settlement of moment, but commanding the entrance by water into an extensive and valuable country, must, from the very nature of it, be considered as intended to prevent the ingress of enemy's vessels; and it became the duty of the garrison stationed there, to guard the pass, and to lay hold of every thing belonging to the enemy, whether the object could be accomplished by means of the guns at the fort, or by means of boats or other vessels attached to it.

The only question then, which remains to be considered, is, have the laws of the United States given to the military any share in prizes taken by troops so circumstanced? It may be desirable that *they had* done so. But this ground seems to be abandoned by the counsel for the army. A kind of negative argument has indeed been raised on the 58th Article of the Rules and Articles of War. It is said that this article confirms to the United States property taken in *camps, &c. but not at sea.* The words of the article in question are, that " all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be accountable." Hence it is concluded, that if they be not public stores, or be not taken in the enemy's camp, towns, forts, or magazines, they are not to be appropriated to the government, but belong to the captors.

The object of this article is clearly not to ascertain any thing about the right of property, but merely to provide for the safe keeping of public stores belonging to the enemy, and to render the commanding officer responsible for any neglect respecting them. Had a prosecution been commenced against the officer commanding at Fort Bowyer, for any inattention to the preservation of the cargo of the schooner Active; this 58th Article, possibly, (inasmuch as the property

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in question was not taken in the enemy's camp, towns, forts, or magazines) might not have afforded a legal basis for the prosecution: but no fair deduction from it certainly can ever be carried as far as to show, that because the property captured was not expressly required by this article to be secured for the United States, therefore it must be regarded as the private property of the captor.

Whether it be so or not, must depend on established principles, and not on so very strained an implication, and these have already been sufficiently examined.

As to the laws of the United States respecting property captured by the public force, the most material is the act of the 23d April, 1800, for the better government of the Navy.

This act gives to the captors the proceeds of vessels and goods taken on board of them when adjudged good prize. But this act is a law expressly for the government *of the Navy* of the United States—and, indeed, it does not appear to be contended, that it can by any rule of construction, be extended to the army.

Private commissioned vessels, in like manner, deserve their right to appropriate to thesmelves the prizes they make, from the "act concerning letters of marque, prizes, and prize goods," passed on the 26th day of June, 1812.

This act, after stating the conditions on which authority should be given to our vessels to capture the vessels and property of the enemy, proceeds to vest the same, when taken under such authority, in the owners, officers and crews of the vessels by which prizes should be made. (Laws U. S. Vol. 11, p. 240.) Had it been the intention of the government that non-commissioned vessels should be entitled to the proceeds of prizes made, or that any persons in the employ of the United States, and not belonging to the navy or marines, should be entitled to the benefit of all enemy's property taken by them; if it would surely have been natural that such intention

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should have been expressed in these or some other legislative acts. Moreover, indeed, it does not appear what occasion there could be to provide regulations and bonds for the government and good conduct of vessels applying for commissions to make prizes; if *all vessels* of any description were authorized to take and to appropriate to their own use the property of the enemy, merely because, as it hath been contended, the fortune of war had thrown it in their way.

It has been stated that a case occurred in New England soon after the war commenced, where a vessel, which had approached near to a fort of the United States, was condemned for the benefit of the troops by whom it was captured: and it is likewise urged that libels have been filed in behalf of military captors in the federal court of the state of Louisiana. As to the former case, it is only stated on a recollection, which I cannot help believing to be in this instance somewhat inaccurate: and as to the latter, how much soever it may afford a precedent sufficient to justify a practitioner at the bar in putting in a claim; it can afford no precedent to justify a court in sustaining it. In the whole view of the case, therefore, now before the court, it is adjudged and decreed, that the plea be over-ruled and dismissed, with costs in court occasioned by the plea, and that the schooner Active and cargo be condemned as good and lawful prize to the United States.

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TO

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